109-203

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No ~~640.~~ 95

EDWARD R. BOOTH, PLAINTIFF IN ERROR,

vs.

JOHN M. TIERNAN.

IN ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 11, 1880.

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INDEX.

	Original.	Print.
Bond for costs	2	1
Declaration	2	1
Plea	4	2
Jury empaneled. Hearing	5	3
Verdict. Motion for new trial	6	3
Motion overruled. Judgment	7	3
Judgment set aside. New trial granted	7	4
Jury empaneled. Hearing	8	4
Stipulation as to admission of facts	9	4
Verdict. Motion for a new trial	11	5
Motion for new trial	12	6
Motion overruled. Judgment	14	7
Judgment set aside. New trial granted	15	7
Hearing	16	7
Cause taken under advisement	17	8
Judgment	18	8
Motion for a new trial	18	9
Motion overruled. Judgment	19	9
Bill of exceptions	20	9
Bond	59	27
Clerk's certificate	61	28
Writ of error	62	28
Citation	63	29
Assignment of errors	65	29

a United States circuit court, northern district of Illinois.

JOHN M. TIERNAN
v.
EDWARD R. BOOTH. } Ejectment.

TRANSCRIPT OF RECORD.

Messrs. Needham and Miller, attorneys for plaintiff in error.
George Burry, esq., attorney for defendant in error.

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof on Saturday the thirteenth day of December, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the one hundred and fourth year.

WILLIAM H. BRADLEY, *Clerk.*

JOHN M. TIERNAN
v.
EDWARD R. BOOTH. } Ejectment.

NORTHERN DISTRICT OF ILLINOIS, *sct:*

Be it remembered that on the seventh day of December, A. D. 1875, came the said plaintiff, John M. Tiernan, by Messrs. Swett and Burry, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, his bond for costs in said entitled cause; which said bond for costs is in the words and figures following, to wit:

Bond for costs.

2 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, December term, A. D. 1875.

JOHN M. TIERNAN
v.
EDWARD R. BOOTH. } In ejectment.

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against my property for any costs taxed against him. Dated this seventh day of December, A. D. 1875.

GEORGE BURRY.

(Endorsed:) Filed Dec. 7th, A. D. 1875. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 24th day of February, A. D. 1876, said plaintiff, by his attorney, filed in said clerk's office, his declaration against the defendant in said entitled cause; which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois, to the March term, A. D. 1876.

John M. Tiernan, who is a citizen of the State of Pennsylvania, and a resident thereof, by George Burry, his attorney, complains of Edward R. Booth, who is a citizen of the State of Illinois and a resident of the northern district thereof, in a plea of trespass and ejectment.

For that whereas, heretofore, to wit, on the sixth day of December, in the year eighteen hundred and seventy-five (A. D. 1875), at and within the county of Grundy, and State of Illinois, and in said northern district, the said plaintiff was possessed as of his demesne in fee simple of that certain tract or parcel of land with the appurtenances, situated in the county of Grundy, in the State of Illinois, and known and described as follows, to wit, the northeast quarter of section twenty-nine (29) in township thirty-two (32) north of the base line, and in range eight (8) east of the third principal meridian, which said premises exceed in value the sum of five hundred dollars ($500.00), and which the said plaintiff claims in fee simple.

And the said plaintiff, being so possessed thereof, the said defendant afterwards, to wit, on the same day and year last aforesaid, entered into said premises and ejected the said plaintiff therefrom, and from
4 the time last aforesaid has unlawfully withheld, and does now unlawfully withhold from the said plaintiff the possession thereof, to the damage of said plaintiff of the sum of six hundred dollars; therefore he brings this suit, etc.

GEORGE BURRY,
Attorney for Plaintiff.

(Endorsed:) Filed Feb'y 24, 1876. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the first day of April, A. D. 1876, said defendant, by his attorneys, filed in said clerk's office his plea in said entitled cause; which said plea is in the words and figures following, to wit:

Plea.

Circuit court of the United States of America for the northern district of Illinois, of the March term of said court, in the year of our Lord one thousand eight hundred and seventy-six.

EDWARD R. BOOTH } Ejectment.
ats.
JOHN M. TIERNAN. }

And the said Edward R. Booth, defendant, by Chas. W. Needham, his attorney, comes and defends the wrong and injury, when, &c., and says that he is not guilty of unlawfully withholding the tenement or any part thereof in manner and form as the said John M.
5 Tiernan has above thereof complained against him, and of this the said Edward R. Booth puts himself upon the country, &c.

CHAS. W. NEEDHAM,
Att'y for Def't.

(Endorsed:) Filed April 1, 1876. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 23d day of November, A. D. 1876, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN M. TIERNAN
vs.
EDWARD R. BOOTH. } Ejectment.

Now come the parties, by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit, N. S. Carrington, Thomas I. Clark, W. P. Dickinson, D. M. Ruger, C. G. Pettybone, James S. Gyles, A. P. Maddock, Alfred H. Cook, J. F. Chesney, James E. McGuire, Guy C. Sampson, and Thomas A. Scott, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

6 Afterwards, to wit, on the 24th day of November, A. D. 1876, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN M. TIERNAN
v.
EDWARD R. BOOTH. } Ejectment.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence on the part of the plaintiff, the jury, under the instructions of the court, return the following verdict, to wit: We, the jury find the defendant not guilty.

And thereupon the plaintiff by his attorney moves the court for a new trial herein.

Afterwards, to wit, on the 16th day of December, A. D. 1876, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN M. TIERNAN
v.
EDWARD R. BOOTH. } Ejectment.

7 Now comes the plaintiff, by his attorney, and now comes on to be heard his motion heretofore entered herein for a new trial of this cause, and after hearing the arguments of plaintiff's counsel the court overrules said motion, to which the plaintiff, by his attorney, excepts.

It is thereupon considered and adjudged by the court that the defendant be discharged and he go hence without day, and that he have and recover of the plaintiff his costs and charges about his defence in this behalf expended, amounting to the sum of twenty-nine dollars and ninety cents, and that he have execution therefor.

Afterwards, to wit, on the 1st day of October, A. D. 1877, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN M. TIERNAN, v. EDWARD R. BOOTH. } Ejectment.

Now comes the plaintiff by George Burry, esq., his attorney, and moves the court to set aside and vacate the judgment entered herein on the sixteenth day of December, A. D. eighteen hundred and seventy-six, to redocket the cause and grant a new trial. And it appearing to the court that all the taxed costs in this cause have been paid
8 by the plaintiff, it is thereupon ordered that said judgment be set aside and vacated, the cause reinstated upon the docket and a new trial granted under the statute.

Afterwards, to wit, on the 21st day of November, A. D. 1878, in the adjourned October term of said court, in the record of the proceedings thereof, in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

JOHN M. TIERNAN v. EDWARD R. BOOTH. } Ejectment.

Now come the parties by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit: E. B. Messer, J. P. Stevens, A. G. Bower, Charles R. Potter, Madison Durley, H. C. DeMann, Seth P. Warner, W. P. Caton, William Pool, Jason Peck, W. L. Lee, and B. F. Stedman, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence the hour of adjournment having arrived the further trial of the cause is postponed until to-morrow morning.

On the same day, to wit, the 21st day of November, A. D. 1878, said parties, by their attorneys, filed in said clerk's office a certain stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

9 *Stipulation.*

In the circuit court of the United States for the northern district of Illinois.

JOHN M. TIERNAN v. EDWARD R. BOOTH. } Ejectment.

It is hereby stipulated and agreed by and between George Burry, attorney for said plaintiff, and Needham and Miller, attorneys for said defendant, that the following facts are admitted by the parties respectively, and may be so taken and considered by the court and jury upon the hearing thereof:

1st. That an original deed from Ibzan Lacey and wife Emma, by

Joel Wicker, their attorney in fact, to Alva Newman, dated the 6th of May, A. D. 1840, is lost; provided nothing herein shall be construed as an admission that said lost deed conveyed the premises in controversy. The deed above referred to is recorded in the recorder's office of Grundy County in book CC, page 361.

2nd. That on or before the 15th day of March, A. D. 1868, Ibzan Lacey, the grantee, in a certain deed from Juddiah Wooley, jr., and wife, of the premises in controversy, dated , 1839; recorded September 10th, 1839, in the recorder's office of Grundy County, in book CC, page 211, died intestate.

3rd. That Sallie C. Wickes, the grantor in a certain deed bearing date March 16th, 1868, and recorded in the recorder's office of
10 Grundy County, on the 30th day of June, A. D. 1868, in book W, page 533, was, at the time of his death, and is, the sole and only heir-at-law of said Ibzan Lacey, deceased.

Dated Chicago, Ill's, March 26th, 1878.

GEORGE BURRY,
Att'y for Pl'ff.
NEEDHAM AND MILLER,
Att'ys for Def't.

(Endorsed:) Filed Nov. 21st, '78. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 22d day of November, A. D. 1878, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

JOHN M. TIERNAN
v.
EDWARD R. BOOTH. } Ejectment.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

11 Afterwards, to wit, on the 23rd day of November A. D. 1878, in the said adjourned October term of said court, in the record of the proceedings thereof, in said entitled cause before the Hon. Thomas Drummond, judge, is the following entry, to wit:

JOHN M. TIERNAN
v.
EDWARD R. BOOTH. } Ejectment.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding arguments of counsel, and receiving the instructions of the court, the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict to wit: We, the jury, find the defendant guilty of unlawfully withholding from the possesion of the plaintiff the real estate and premises described in his declaration as follows:

That certain tract or parcel of land with the appurtenances situated in the County of Grundy, in the State of Illinois, and known and de-

scribed as follows, to wit: The northeast quarter of section twenty-nine (29) in township thirty-two (32) north of the base line, and in range eight (8) east of the third principal meridian; we also find the estate established in the plaintiff on the trial to be an estate in fee simple and assess his damages to the sum of one cent; and thereupon the de-
12 fendant, by his attorney, moves the court for a new trial herein.

And on the same day, to wit, the 23d day of November, A. D. 1878, said defendant, by his attorneys, filed in said clerk's office, his motion for a new trial in said entitled cause; which said motion is in the words and figures following, to wit:

Motion for new trial.

In the circuit court of the U. S. for the northern district of Illinois, October term, 1878.

JOHN M. TIERNAN } *vs.* } Ejectment.
EDWARD R. BOOTH. }

Now comes the defendant, by his attorney as aforesaid, and moves the court to set aside the verdict rendered, and to grant a new trial in this cause; and for grounds of his motion the defendant shows to the court the following, to wit:

First. The court admitted on the trial improper evidence on the part of the plaintiff; that is to say:

1st. The court improperly admitted on the part of the plaintiff a certified copy of a record of a certain deed from Ibzan Lacey and wife, by Joel Wicks, their attorney in fact, to Alva Newman, bearing date the 6th day of May, 1840, and recorded in book CC, page , for
13 the southeast quarter of section 29, 32, 8.

2nd. The court improperly admitted on the part of the plaintiff, a certified copy of a page of the entry-book, kept by the recorder of the county of La Salle, Illinois, upon which appeared an entry of a supposed deed from said Lacey and wife, by their said attorney in fact, to said Newman for the northeast quarter of said section.

3rd. The court improperly admitted the testimony of Gurdon Secor, a witness on the part of the plaintiff, the same, and each and every part thereof, being incompetent, indefinite, and wholly improper on the part of the plaintiff at the time and in the manner the same was introduced in evidence.

4th. The court improperly admitted the testimony of Daniel C. Rork, a witness on the part of the plaintiff, the same, and each and every part thereof, being incompetent, indefinite, and wholly improper on the part of the plaintiff at the time and in the manner the same was introduced in evidence.

5th. The court improperly admitted the testimony of William B. Ogden, a witness produced and sworn on the part of the plaintiff.

6th. The court improperly admitted, on the part of the plaintiff, testimony by certain witnesses in regard to the character and reputation of "Hilt Titles," so called, by plaintiff's attorney.

14 Second. The court improperly gave to the jury the instructions, and each and every part thereof set forth in the exceptions taken by the defendant's counsel thereto and filed herein.

Third. The court improperly submitted to the jury the question, "Did

the recorder make a mistake in recording the deed of date the 6th of May, 1840?"

Fourth. The verdict of the jury is contrary to the law and the evidence in the case.

NEEDHAM AND MILLER,
Atty's for Defendant.

(Endorsed:) Filed Nov. 23, 1878. William H. Bradley, cl'k.

Afterwards, to wit, on the 2d day of January, A. D. 1879, in the December term, A. D. 1878, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

JOHN M. TIERNAN
v. } Ejectment.
EDWARD R. BOOTH.

Now come again the parties, by their attorneys, and now comes on to be heard the motion herein of the defendant for a new trial of this cause, and, after hearing the arguments of counsel, the court overrules said motion and awards judgment. It is thereupon considered
15 and adjudged by the court that the plaintiff do have and recover of the defendant possession of the real-estate and premises aforesaid described, according to the force, form, and effect of his said recovery, and that he have a writ of possession therefor, and that he also have and recover of the defendant the said sum of one cent, his damages as aforesaid assessed, together with his costs and charges in this behalf expended, amounting to the sum of sixty-three dollars and twenty-five cents, and that he have execution therefor.

Afterwards, to wit, on the 11th day of January, A. D. 1879, in the said December term, A. D. 1878, of said court in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN M. TIERNAN
v. } Ejectment.
EDWARD R. BOOTH.

Now comes the defendant, by his attorney, and moves the court to set aside and vacate the judgment entered herein on the second day of January instant and grant a new trial. And it appearing to the court that all the taxed costs herein have been paid by the defendant, it is therefore ordered by the court that said judgment and the verdict
16 herein be set aside and vacated and a new trial granted under the statute.

Afterwards, to wit, on the 11th day of June, A. D. 1879, in the adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and the Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

JOHN M. TIERNAN
v. } Ejectment.
EDWARD R. BOOTH.

Now comes the parties, by their attorneys, and upon issue joined by

agreement of the parties, as per stipulation filed, they waive the intervention of a jury, and for trial put themselves upon the court; and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 12th day of June, A. D. 1879, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

JOHN M. TIERNAN
v.
17 EDWARD R. BOOTH. } Ejectment.

Now come again the parties, by their attorneys, and after hearing the concluding evidence upon the issue herein, the arguments of counsel are postponed until Monday morning next.

Afterwards, to wit, on the 16th day of June, A. D. 1879, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and the Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

JOHN M. TIERNAN
v.
EDWARD R. BOOTH. } Ejectment.

Now come again the parties, by their attorneys, and after hearing the arguments of counsel upon the issue herein the court, not being now sufficiently advised in the premises, takes the same under advisement.

Afterwards, to wit, on the 8th day of December, A. D. 1879, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

JOHN M. TIERNAN
v.
18 EDWARD R. BOOTH.

The issue in this cause having been by stipulation in writing heretofore submitted to the circuit justice and to the circuit judge, and a jury having been waived therein and argued by the counsel of the respective parties, and the said judges having agreed upon their finding herein, do now accordingly find the defendant guilty of unlawfully withholding possession of the premises described in the declaration from the plaintiff, and find that the estate established on the trial in the plaintiff is an estate in fee simple, and the damages of the plaintiff are assessed at one cent; and thereupon the defendant, by his counsel, moves the court for a new trial.

Afterwards, to wit, on the 13th day of December, A. D. 1879, said de-

fendant, by his attorneys, filed in said clerk's office his motion for a new trial in said entitled cause; which said motion is in the words and figures following, to wit:

In the circuit court of the United States, for the October term, A. D. 1879.

JOHN M. TIERNAN
v.
EDWARD R. BOOTH. } Ejectment.

And now comes the said defendant, by Needham and Miller and
19 B. C. Cook, his attorneys, and moves the court to set aside the finding rendered and to grant a new trial in this cause; and for grounds of his motion the defendant shows to the court the following, to wit:

First. The court admitted on the hearing improper evidence on the part of the plaintiff.

Second. The court excluded on the part of defendant proper evidence.

Third. The finding of the court is contrary to the law in the case.

Fourth. The finding of the court is contrary to the evidence in the case.

NEEDHAM AND MILLER,
B. C. COOK,
Att'ys for Defendant.

(Endorsed:) Filed Dec. 13, 1879. Wm. H. Bradley, cl'k.

And on the same day, to wit, the 13th day of December, A. D. 1879, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

JOHN M. TIERNAN
v.
EDWARD R. BOOTH. } Ejectment.

Now come the parties, by their attorneys, and the court having
20 considered and being now fully advised upon the defendant's motion for a new trial herein overrules the same. It is thereupon considered and adjudged by the court that the plaintiff have and recover of the defendant possession of the real estate and premises described in said declaration to wit: The northeast quarter of section twenty-nine (29), in township thirty-two (32) north of the base line, and in range eight (8) east of the third principal meridian, in the county of Grundy and State of Illinois, according to the force, form, and effect of his said recovery, and that he have a writ of possession therefor, and also have and recover of the defendant his costs and charges in this behalf expended, taxed at the sum of forty-three dollars and five cents, and that the plaintiff have execution therefor.

And on the same day, to wit, the 13th day of December, A. D. 1879, on the trial of said cause, the following exceptions were taken and allowed by the court, and made of record in said entitled cause to wit:

Bill of exceptions.

Circuit court of the United States, northern district of Illinois.

JOHN M. TIERNAN
v.
EDWARD R. BOOTH. } Ejectment.

21 BILL OF EXCEPTIONS.

On the trial of this case before the circuit justice and the circuit judge in the said circuit court (a jury having been waived by stipulation of the parties in writing), on the 11th and 12th days of June, 1879, the plaintiff to maintain the issue on his part introduced the following evidence.

1. An agreement that Ibzan Lacy had title to the premises in controversy during the year 1839 from the United States.

2. A power of attorney from the said Ibzan Lacy and wife dated April 20, 1839, to Joel Wicks, authorizing him to sell and convey to any one the premises in controversy.

3. A stipulation and agreement that the original deed from Ibzan Lacy and wife by Joel Wicks, their attorney in fact, to Alva Newman, dated the 6th day of May, 1840, had been lost, and the plaintiff proved that it was not in his power to produce the said original deed, and that to the best of his knowledge said original deed was not intentionally destroyed or in any manner disposed of for the purpose of introducing a copy thereof in place of the original.

4. A certified copy from the proper recorder's office of said deed, as follows:

This indenture made this sixth day of May, in the year one thousand eight hundred and forty, between Ibzan Lacey and Eunice, his wife, of Cairo, Green County, and State of New York, by their attorney
22 in fact, Joel Wickes, of the first part, and Alva Newman of the Territory of Wisconsin of the second part, witnesseth: That the said parties of the first part, for and in consideration of four hundred and fifty dollars in hand paid by the said party of the second part (the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom) have granted, bargained, sold, remised, released, alienedand confirmed, and by these presents do grant, bargain, sell, remise, release, alien, and confirm unto the said party of the second part, and to his heirs and assigns forever, all the following described piece or parcel of land to wit: The south-east quarter of section numbered twenty-nine (29), in township number thirty-two (32) north, range number eight (8) east, of the third principal meridian, containing one hundred and sixty acres of land, more or less, as the same is known and described on the books in the land office in the city of Chicago, said land being situated in the county of La Salle, and State of Illinois; together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, or demand whatsoever of the said parties of the first part either in law
23 or in equity of, in, and to the above-bargained premises, with the hereditaments and appurtenances; to have and to hold the said premises above bargained and described, with the appurtenances, unto

the said party of the second part, his heirs and assigns forever. And the said Ibzan and Eunice, for themselves, their heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents, they are well seized of the premises above conveyed as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and have good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the same are free and clear of all former and other grants, bargains, sales, liens, judgments, taxes, assessments, and encumbrances of what kind and nature soever; and the above-bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, shall and will forever warrant and defend.

In witness whereof the said parties of the first part have here-
24 unto set their hands and seals the day and year first above written.

IBZAN LACEY, [SEAL.]
EUNICE LACEY, [SEAL.]
By their attorney in fact, JOEL WICKES. [SEAL.]

Sealed and delivered in presence of—
JEDUTHAN BROWN.
F. A. HOWE.

This land was entered by Jeddiah Wooley, August 8th, 1835.

STATE OF ILLINOIS,
Cook County, ss:

I, Frederick A. Howe, a justice of the peace in and for the county of Cook, and State aforesaid, do hereby certify that Ibzan Lacey and Eunice Lacey, by their attorney in fact, Joel Wickes, whose name is subscribed to the within deed of conveyance, appeared before me this day in person and acknowledged that he signed and sealed the within deed of conveyance as his free and voluntary act and deed, for the uses and purposes therein set forth.

Given under my hand and seal this sixth day of May, A. D. 1840.

F. A. HOWE, *J. P.* [SEAL.]

STATE OF ILLINOIS,
Cook County, ss:

I, George Davis, clerk of the county commissioners' court of Cook County, do hereby certify that F. A. Howe, whose name is subjoined to the foregoing proof or acknowledgment of the foregoing deed, was, at the time of taking the same, an acting justice of the peace, duly commissioned and sworn, and authorized to take the same; and full
25 faith and credit is due, and of right should be given to all his official acts as justice.

In testimony whereof I have hereunto set my hand and the seal of said county this 6th day of May, A. D. 1840.

[SEAL.] GEO. DAVIS, *Co. Clerk.*

Filed May 14, 1840.

STATE OF ILLINOIS,
La Salle County, ss:

I, Charles W. Denhard, recorder of deeds, &c., in and for said county, in the State aforesaid, do hereby certify that the above and foregoing is a true, full, and complete copy of a deed as it appears recorded in book No. 4, on page 346 of the land records of said county.

Witness my hand and official seal this 15th day of April, A. D. 1876.

[SEAL.] C. W. DENHARD, *Recorder.*

26 This copy of the deed was offered in connection with the statement made by the counsel of the plaintiff to the court, that there would be offered other evidence tending to show that there was a clerical error in the description of the land as entered upon the record and contained in the copy in this, that it should be the NE. ¼ of sec. 29, instead of the SE. ¼ section 29.

To the introduction of this certified copy of the deed the defendant then and there objected.

First. Because no foundation was laid for the introduction of a certified copy.

Second. Because it does not describe the land in controversy, but the court at that time overruled the objection so made to the introduction of said copy, stating that it would reserve the question until the testimony was all before the court; to which opinion of the court the defendant then and there excepted.

27 5. A certified copy of a deed from Alva Newman and wife to Charles Tiernan, dated October 29, 1842, conveying the land in controversy; to the introduction in evidence of which certified copy the defendant objected, because no title had been shown in the grantor to the premises in controversy, but the court overruled the objection on the same ground as previously stated; to which opinion of the court the defendant then and there excepted.

6. A certified copy of a deed from Charles Tiernan and wife to John C. Murphy, dated September 15, 1845, conveying the land in controversy.

7. A mortgage from John C. Murphy and wife to Seth C. Tiernan and Morris Jones, as executors of Michael Tiernan, dated October 10, 1846, conveying the land in controversy.

In connection with this mortgage, evidence was offered, showing that the debt secured by the mortgage, had never been paid, and that the equity of redemption, and the possession of the land had been surrendered to the mortgagee in satisfaction of the mortgage.

To the introduction of this mortgage, the defendant, by his counsel objected:

First. Because no title was shown in the mortgagor; and,

Second. The title could not be derived under the mortgage;

28 which objection, for the reason aforesaid, as to the title of the mortgagor was overruled by the court; to which opinion of the court the defendant then and there excepted.

8. A deed from the heirs of John C. Murphy to John M. Tiernan, dated November 26th, 1875, conveying the land in controversy.

To the introduction of which deed the defendant by his counsel objected because there was no title shown to be in the grantor to the premises in controversy, and which objection for the reason heretofore stated was overruled by the court; to which opinion of the court the defendant then and there excepted.

9. A certified copy of the last will and testament of Michael Tiernan,

deceased, duly authenticated, constituting and appointing Seth C. Tiernan and Morris Jones, executors with full power and authority to sell and convey any and all real estate, owned by the testator, said will being dated March 1, 1845.

To the introduction of said certified copy of the will in evidence, defendant objected because no title was shown to the land in controversy in the said Michael Tiernan, and because the will did not describe the land, which objection for the reason aforesaid was overruled by the court; to which opinion of the court defendant then and there excepted.

29 10. A deed from Morris Jones, as sole surviving executor of Michael Tiernan to John M. Tiernan, the plaintiff, Michael Tiernan, Francis Tiernan and Margaret, wife of Morris Jones, children of Michael Tiernan, dated November 12, 1875, conveying the land in controversy.

To the introduction of which deed the defendant objected because no title was shown in the grantor and because their interest as mortgagee under the mortgage could not be conveyed, but the court for the reason aforesaid, overruled the said objection; to which opinion of the court the defendant then and there excepted.

11. A deed from Michael Tiernan to John M. Tiernan, conveying the land in controversy, dated Nov. 24, 1875; to the introduction of which deed in evidence, the defendant by his counsel then and there objected because there was no title shown in the grantor, which objection, for the reason aforesaid, was overruled by the court; to which opinion of the court the defendant then and there excepted.

12. A deed from Francis Tiernan to John M. Tiernan, dated November 24, 1875, conveying the land in controversy.

To the introduction of which deed the defendant by his counsel objected for the reason that there was no title shown in the grantors
30 and the court, for the reason aforesaid, overruled said objection; to which opinion of the court the defendant then and there excepted.

13. A deed from Morris Jones and wife to John M. Tiernan, conveying the land in controversy, dated November 12, 1875.

To which evidence the defendant, by his counsel, objected because there was no title shown in the grantor; which objection the court overruled for the reason aforesaid, to which opinion of the court the defendant then and there excepted.

14. A certified copy from the original records of the recorder's office of La Salle County of 1840, in which county the land in controversy was situated at the time that the conveyance was made by the attorney of Lacy to Newman, and in which the same was recorded, of a memorandum made by the recorder and claimed to be required by statute and to be kept by the recorder.

31

Date.	Grantor.	Grantee.	A. M.	P. M.	Inst.	Date.	Location.
1840.							
May 12	Gurley, Jason	Gurley, John	11		Deed	9 May, 1840	Und. ½ of S. ½ N. E. ¼ sec. 25; also S. ½, W. ¼, sec. 25; also S ½ of N. E. ¼ sec. 26, T. 35 N., R. one E of 3d P. M.
" "	Shepard, Ruth	Ashley, Stephen	11		Deed	5 May, 1840	In Sec. No. 1, T. 36 N. R. 7 E. 3d P. M.
" "	How, Titus	Shepard, Ruth	"		"	14 April, 1840	Part sec. 4, T. 36 R. 7 E. 3d P. M., do. same; also, mill lot in Kane Co'y.
" "	Ervin, Thomas	Lebaron, John R	"		"	17 March, 1840	Part of sec. 18, T. 36 N. of R. 7 E. 3d P. M., La Salle County.
" "	Green, John	Dunavan, Wm. L	"		"	4 June, 1839	Lot 1, B. 6 & L. 2, B. 6, town of Dayton.
" "	Gunn, Aaron	Robinson, John		3	"	29 June, 1839	" 1, B. 14, town of Peru.
" 13	Sebing, Benj	Welch, Thomas	7		"	29 November, 1839	West ½, N. W. ¼ S. 34, T. 36, R. 3 E., &c.
" "	Welch, John & N	Welch, Thomas	"		"	14 February, 1840	$\frac{7}{9}$ parts sec. 26, T. 35, R. 1, E., &c.
" "	do. Fanchilas	do John & Nathan	"		"	1 do. 1840	$\frac{2}{9}$ equal parts S. E. ¼ S. 26, T. 35, R. 1 E, &c.
" "	Titsey, Anthony	Wright, John & C	"		"	13 April, 1840	Ap. N. W. ¼ of S. 21, T. 35 N. R. 6 E.
" "	Armstrong, John	Peck, Philander	"		"	20 November, 1839	S. ½ N. W. ¼ S. 23, T. 35, N. R. 5 E.
" "	Hoes, John & A	Nichols, Eli	8		"	13 May, 1840	L. 4. B. 12, Peru.
" 14	Garret, A	Beaubran	8		"	9 January, 1837	N. ½ & S. E. ¼ E. ½ S. W. ¼ S. 18., T. 39 N. R, &c.
" "	Lacey, Ibzan	Wickes, Joel	8		Att'y, power of	20 April, 1839	Power of attorney to convey land.
" "	" "	Newman, Ava	8		"	6 May, 1840	N. E. ¼ S. 29, T. 32 N. R. 8 E. 3d P. M.
" "	Jones, William	State Bank Ills	10		"	9 April, 1840	S. ½ S. 27, T. 34 N. R 5 E. & E. ½ S. 18, T. 34 N. R. 5 E.
" "	Parsons, H	do " "	10		"	4 May, 1840	S. W. & N. E. ¼ & W. ½ S. E. ¼ S. 22, T 33, R. 7, &c.
" "	Green, John	Stadden, Wm	10		"	5 Dec., 1839	Lots 3, 4 & 5, B. 12 & L 3, 4, 6 & 7, B. 13, town Dayton.
" "	Delano, Loring	School Commissioner		5	Mort	18 May, 1840	Lots No. 4 and 5 in B. 16, L. 3, B. 19, lots 9, 10, 11, B. 20, T. Ottawa Center.
" 15	Knickerbocker, Am	Spalding, Morris	8		Deed	30 Nov., 1839	Lots No. 11, B. 153, Ninawa ad'n, Peru.
" "	Brewster, L. D	Kinney, Henry L	8		Agt	7 M'ch, 1835	Agst.
" "	States, United	Reed, Derias	12		Pet	17 June, 1835	E ½ N. W. ¼ sec. 14, T. 33 N. R. 6 E.
" "	Kimball, Lovell	Hurd, Deborah		1	Deed	11 May, 1840	2 und'd 8ths of water-power and lots at Marseilles, Illinois.
" "	Kimball, Lovell	Marseilles, Mang. Cop		1	"	11 May, 1840	2 und'd 8ths of " " " "
" "	Dow, Robert M	Kimball, Lovell		1	Noc	8 May, 1840	W. ½ of E. ½ of sec. 26 in T. 34 N. of R. 5 E. 3d P. M.
" "	Bigelow, Hardin	Hoffman, John		1	Deed	1 April, 1840	65 @ $\frac{100}{100}$ of an a., C. 9, N. W. 6 of N. E. ¼ of sec. 35, T 35 N. of R. 1 E.
" "	Reeder, David, and others	Bigelow, Hardin		1	"	22 March, 1839	Pt. of sec. 35 T. 35 N. R. 1 E.
" "	Massey, J. W	Kimball, Lovell		1	Noc	8 May, 1840	E. ½ of E ½ of sec. 26, T. 34 N. R. 5 E.
" "	do. C. C	do. do.		1		" " 1840	W. ½ of sec 36, T. 34 N. R. 5 E.
" "	Harrott, Isaac	McMartin, Peter	8		D	5 Nov. 1839	E. ½ of N. W. ¼ of sec. 22. T. 35 N. R. 4 E. 3d P. M.

STATE OF ILLINOIS, *La Salle County, ss:*

I, Charles W. Denhard, recorder of deeds, &c., in and for said county, in the State aforesaid, do hereby certify that the within and foregoing is a true, full, and complete copy from a page of the entry or file book now remaining in this office.

Witness my hand and official seal this 15th day of April, A. D. 1876.

[SEAL.]

C. W. DENHARD, *Recorder.*

32 To the introduction of which the defendant by his counsel objected, because:

First. The same was no evidence of the contents of the deed.

Second. The law did not require the recorder to copy the description of the land into this memorandum.

Third. The statute does not make this memorandum evidence.

Fourth. The same cannot be proved by a certified copy from the recorder.

Fifth. It tends to contradict the copy of the deed already in evidence.

Sixth. It does not appear from the certificate that this memorandum was in a book kept in the recorder's office at the time that the entry bears date pursuant to any requirement of law.

Which objections the court overruled and admitted said certified copy as evidence; to which opinion of the court the defendant then and there excepted.

15. A transcript from the land office at Springfield, Illinois, in which office was contained the records of the entry of the land in controversy showing that Jeddiah Wooley entered the NE. ¼ 29, 32, 8, on the 8th day of August, 1835, and that he did not enter the SE. ¼ of said section.

To the introduction of which transcript the defendant objected because it was immaterial and incompetent, but the court over-
33 ruled the objection; to which opinion of the court the defendant then and there excepted.

16. A receipt from the land office at Chicago, Illinois, in which office the land in controversy was sold, dated August 8, 1835, for $200 from Jeddiah Wooley, jr., in full payment of the NE. ¼, section 29, town. 32 N R. 8 east of the 3rd principal meridian, being the land in controversy.

The following memorandum was endorsed upon the receipt proved to have been in the handwriting of Joel Wicks, now dead, "sold this to Alva Newman May 6th, 1840,"

To the introduction of which said receipt the defendant objected because it was immaterial to the controversy, which objection the court overruled; to which opinion of the court the defendant then and there excepted.

17. The death of Seth C. Tiernan, one of the executors of Michael Tiernan, between the years of 1851 and 1855; and also the death of Michael Tiernan, and that Francis Tiernan and Mrs. Morris Jones, Michael Fiernan, Seth C. Tiernan, and plaintiff, were Michael Tiernan's only heirs at law and devisees; that Seth C. Tiernan died intestate without children.

18. Testimony of Gurdon Secor, a justice of the peace, who drew the deed and took the acknowledgment to the deed from Newman and wife to Charles Tiernan.

Testimony of GURDON SECOR, taken before Jonathan Summerton, in the county of Racine, State of Wisconsin, on July 18, 1878.

Direct examination by Mr. BURRY:

34 Q. Mr. Secor, were you justice of the peace in 1842?

A. I was in 1842 and 1843.

Q. Do you remember of making a deed for Alva Newman, then of Racine County, for some land in Illinois?

A. I do.

Q. Who asked you to draw that deed?

A. Alva Newman. He brought me a deed and asked me to draw another one from it.

Q. Did he give you any other memorandum of the land to be conveyed than the description in the deed he brought you?

(Question objected to.)

A. He did not.

Q. What was your custom about comparing deeds when you drew them with the memoranda furnished you to draw them from?

(Question objected to.)

A. It was my custom in general to compare the deeds by one person reading over one and I looking at the other to see that they were correct, as in those days there was considerable trouble in regard to landmarks, and we had to be very particular to see that they were correct.

Q. Did you draw many deeds for Alva Newman?

A. I never drew but one.

Q. Do you refer to the one now described?

(Question objected to.)

A. Yes; the one I refer to.

Q. Did you know Alva Newman?

A. I did, as long since as I could walk alone, as we were boys together in New York State.

35 Q. Did you know pretty well all the land Alva Newman owned?

(Question objected to.)

A. I don't know that I do.

Q. Did you have any conversation with Alva Newman as to what land he wanted to deed away at that time?

(Question objected to.)

A. He told me that he had land in Illinois that he wanted to dispose of to get part of his debt from Lewis Benton, and Mr. Weeks was going to try to get it for him.

Q. Mr. Secor, I forgot to ask you the first formal question. What is your name, age, residence, and occupation?

A. My name is Gurdon Secor; my age is 65 years; residence, Mount Pleasant, county of Racine, and State of Wisconsin; occupation, farmer.

Cross-examination by Mr. MILLER:

Q. Mr. Secor, when was your attention first called to the making of this deed referred to in your direct examination, after you had made it?

A. About one year ago.

Q. By whom was your attention then called to it?

A. Daniel B. Rork.

Q. Were the circumstances in connection with the making of the deed then fresh in your recollection?

A. They were when we came to talk over the matter.

36 Q. Then your recollection was assisted by remarks or suggestions made by Mr. Rork?

A. Not altogether, but somewhat.

Q. When was your attention next called to the making of the deed?

A. About one year ago; but, come to think, it must have been about 2 years ago when we first talked about it.

Q. By whom was your attention directed to it the second time?

A. By Daniel B. Rork and Mr. Burry, plaintiff's attorney.

Q. When was your attention next called to it?

A. Yesterday afternoon.
Q. By whom?
A. Andrew Secor.
Q. Who is Andrew Secor?
A. A son of David Secor.
Q. How did he come to speak to you about it?
A. He said Squire Summerton sent word for me to come up to his office at Franksville this morning at nine o'clock.
Q. When you were squire at the time referred to did you draw many deeds?
A. I did; a good many of them.
Q. How do you recollect that after you had drawn the deed referred to you compared it with another deed brought to you by Mr. Newman?
A. It was my way of comparing all deeds, to be sure that they were correct.
Q. You simply infer, therefore, that because you was in the habit of comparing deeds you compared the one drawn by you at this
37 time with the deed brought to you by Mr. Newman?
A. Yes; for it was always my way of doing business. I don't infer that more than any other.
Q. Will you swear, Mr. Secor, that you recollect distinctly the circumstance of your comparing this deed with the one brought to you by Mr. Newman?
A. I can't swear positively, as it was my manner and form with all deeds; more that than any other.
Q. Is it not possible that you sometimes forgot to make this comparison?
A. I might have, and might not have; it was not my intention.
Q. Is it not possible that even if you did compare the deeds, and if a mistake had been made in a deed made by you, such mistake might have been overlooked?
(Question objected to.)
A. If it was it would be the first one against me, as I never had any mistakes in any writing I made out.
Q. Do you know as a fact that the description of the deed made by you was the same in every particular as the deed brought to you by Newman?
A. I think they were.
Q. What makes you think so?
A. I drew the deed; that makes me think so.
Q. Is that the only reason you have for thinking so?
A. I don't know of any other.
38 Q. What deed did Newman bring you?
A. I can't say certain whether it was from Weeks or Benton.
Q. What was the description of the land conveyed by that deed?
A. I can't tell you.

Redirect examination by Mr. BURRY:

Q Mr. Secor, how long ago was it when you were first spoken to about this deed?
A. I think it must have been about two years ago since Mr. Rork spoke to me about it.

GURDON SECOR.

(To this evidence defendant objected.

First. Because it did not show what deed the witness took the description from.

Second. That the witness did not connect the description of land in the deed which he drew with the land in controversy.

Third. Because it contradicts the evidence already introduced by the plaintiff.

But the court overruled the objection; to which opinion of the court the defendant then and there excepted.)

19. Deposition of one Rorke, who testified as follows:

Testimony of DANIEL B. RORK, taken before Jonathan Summerton, in the county of Racine and State of Wisconsin, on July 1, 1878.

Direct examination by Mr. BURRY:

Q. What is your name, age, residence, and occupation?

39 A. Daniel B. Rork; age, 64; residence, Caledonia, Racine County, State of Wisconsin; occupation, farmer.

Q. Did you know Alva Newman, of Racine County, and is he now alive?

A. Yes; and has been dead over twenty years.

Q. What relation did you bear to Alva Newman?

A. I was son-in-law.

Q. Did that relation exist in 1840 to 1842?

A. I married his daughter in 1837.

Q. After that marriage, were you well acquainted with all his business transactions?

(Question objected to.)

A. Yes, I was, for I done a great deal for him.

Q. Do you remember his acquiring some land in Illinois in 1840?

A. I think it was in 1840 that I went down to Chicago with him to see Mr. Weeks, who was agent for Mr. Benton, who thought that he could secure him on an old debt by giving him 160 acres of land and some cattle.

Q. Was there a deed made to Mr. Newman of this land?

(Question objected to.)

A. Weeks made the deed as attorney for his father-in-law, as the title was not invested in him.

Q. Were you present in the room when Weeks, as attorney in fact for his father-in-law, made the deed to Mr. Newman?

(Question objected to.)

40 A. I was there, as I took my father-in-law down, he being a very timid man.

Q. Did you conduct the negotiation principally for your father-in-law?

(Question objected to.)

A. I did; and went down to Belvidere and got the cattle.

Q. Did you see Mr. Weeks execute the deed and hand it over to yourself or father-in-law?

(Question objected to.)

A. They made out the papers; and it strikes me that Weeks was to send the deed down for recording while they were making out the papers; I was in and out, but I know the deed was made out, as I saw it and had it in my hand.

Q. Was the deed ever again in your possession?

A. Yes; I had them.

Q. To whom did Mr. Newman sell this land?

A. Tiernan.

Q. State the circumstances under which he sold it.

A. We described the land to him as near as we could, and he being somewhat acquainted with the country, he said he would give us 150 sheep, provided it was all right. Newman and I had never seen the land.

Q. Who conducted these negotiations; you or your father-in-law?

A. I did; as he was no trading man.

Q. Was there a deed made to Tiernan?

(Question objected to.)

A. There was.

Q. Did you have the two deeds, the one to Tiernan and the one to Newman, in your possession?

41 A. Yes.

Q. What did you do with them?

A. I gave them both to Tiernan.

Q. Did Tiernan examine them?

(Question objected to.)

A. Yes; he took them and examined them, and took them with him to see if it was all right, and was to be back in two weeks, and we was to keep the sheep two weeks.

Q. Did he ever come back?

A. He never came back.

Q. Had you any other description of the land than that contained in the deed to Newman?

A. None at all.

Q. Mr. Rork, have you any idea where that land was situated; in what county?

A. I can't remember now; I think Weeks said it was about 80 miles from Chicago.

Q. Were you acquainted with Weeks before this transaction took place?

A. I was down in Chicago in 1836 and saw him there.

Q. Did Alva Newman ever own any other land in Illinois?

A. No; he did not; for I settled up his estate and papers, and know he did not.

Q. Did Tiernan seem to be a careful business man?

(Question objected to.)

A. He did not want to get cheated, and wanted to be on the safe side.

Q. Do you know either of the parties to this suit?

42 A. I do not.

Cross-examination by Mr. MILLER:

Q. Mr. Rork, do you know where the land is situated which you say Alva Newman received through Mr. Weeks?

A. I think he said it was in a southwestern direction from Chicago about 80 miles.

Q. Is that as accurately as you can now describe it?

A. It is at present.

Q. Can you state the contents of the deed which you say Mr. Weeks gave to Mr. Newman?

A. I cannot.

Q. You state in your direct examination that Tiernan took the two deeds and examined them; state, if you please, if you saw him examine them and in what manner he examined them.

A. We took the deeds, the one that Secor made and the other one, and read them, over to see they were right.

Q. How do you recollect the circumstance, occurring as it did so long ago?

A. The business was left to me up to that time. Tiernan had not seen them, so we took them and examined them.

Q. How did you examine them?

A. We opened them and read them.

Q. Did you compare the two deeds sentence by sentence and word by word?

A. I can't say that we did; we read them over and thought they was all right.

43 Q. Mr. Rork, will you swear that the description of the land in the deed from Newman to Tiernan was the same in every particular as the description in the deed from Weeks to Newman?

A. I can only say we thought it was; we did not discover any difference.

Q. But you have no positive knowledge of what the description was in either deed?

A. Not at this time; I could not tell what the quarters and sections were.

Q. Mr. Rork, when was your attention first called to these two deeds, after the sale of the land to Tiernan?

A. About two years ago, by receiving a letter of inquiry from a lawyer in Chicago, by the name of Burry.

Q. When was your attention next called to it?

A. By being subpœnaed to Chicago to the trial of this case before Judge Blodgett?

Q. When was your attention next called to it?

A. Last fall, by letter asking me to come down to another trial.

D. B. RORK.

(To the introduction of which testimony the defendant objected, which objection was overruled by the court; to which opinion of the court the defendant then and there excepted.)

And thereupon, after the introduction of the aforesaid evidence, the defendant renewed his objections to the admission of the deed of May 6, 1840, from Lacey and wife, by their attorney, to Alva New-

44 man, which objections the court finally overruled, admitting the certified copy as evidence in the case, to be considered with other evidence by the court.

It was admitted at the time that the copy of the deed of May 6, 1840, was offered in evidence that the form and manner in which the attestation clause and the signatures, together with the memorandum of the date and the person by whom the land was entered, as appeared on the record of the deed as recorded in the recorder's office, were as follows:

IBZAN LACEY, [SEAL.]
EUNICE LACEY, [SEAL.]
By their attorney in fact, JOEL WICKES.

Sealed and delivered in presence of—
JEDUTHAN BROWN,
F. A. HOWE.

This land was entered by Juddiah Wooley, August 8, 1835.

To the introduction of which the defendant objected, which objection

was overruled by the court, and to which opinion of the court the defendant then and there excepted.

In admitting the copy of the deed of May 6th, 1840, from Lacey to Newman, the court did not decide that the memorandum, "This land was entered by Jeddiah Wooley August 8, 1835," was competent evidence; and in admitting the receipt from the land office of the payment of $200 from Wooley, of the 8th of August, 1835, the court
45 did not decide that the endorsement on the back, "Sold this to Alva Newman, May 6, 1840," was competent evidence.

After there had been one trial of this case in this court there were certain depositions taken of witnesses after an inspection of the records of La Salle County of May, 1840, and certain interrogatories were put to the witnesses, and answers given in relation to those records; and after those depositions were taken it was stipulated between the parties that records Nos. 4 and 5, and the entry-book and tract index-book, which were referred to in said depositions shown to the witnesses in the above and foregoing depositions, are the original records of La Salle County; and that the power of attorney from Ibzan Lacey to Joel Wickes and the deed from Ibzan Lacey and wife by Joel Wickes, their attorney in fact, to Alva Newman, referred to in the interrogatories and answers in the foregoing deposition, are the power of attorney and deed introduced in evidence on the trial in the foregoing case; and that the page in the entry-book referred to is the page from which the certified copy introduced by the party on the trial of the above-entitled case was taken.

The defendant offered evidence showing that on the 16th of March, 1868, Ibzan Lacey, being dead, his sole heir-at-law made a con-
46 veyance of the land in controversy to one Stanley; and that on the 6th of August, 1868, the defendant, by a proper conveyance, acquired the title of Stanley to the land in controversy.

The defendant also gave in evidence a certified copy of a deed from Jeddiah Wooley, to Ibzan Lacey, dated in 1839, conveying the SE. ¼ sec. 29, T. 32 N., R. 8 E. 3rd p. m., as follows:

Woolley, Jeddiah, and Betsey, his wife.—Deed to Lacey, Ibzan.

This indenture, made this day of , in the year of our Lord one thousand eight hundred and thirty-nine, between Jeddiah Woolley and Betsey, his wife, of Will County, and State of Illinois, of the first part, and Ibzan Lacey, of the town of Cairo, county of Greene, and State of New York, of the second part, witnesseth: That the said parties of the first part, for and in consideration of one thousand dollars to them in hand paid by the said party of the second , the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, alien, and confirm unto the said party of the second part, *the receipt whereof is hereby acknowledged, have granted bargained, sold, remised, released, aliened, and confirmed, and*
47 *by these presents do grant, bargain, sell, remise, release, alien, and confirm unto the said party of the second part*, and to his heirs and assigns forever, all the following-described pieces or parcels of land situate, lying, and being in the county of La Salle, and State of Illinois, and described upon the government map in the land office at Chicago, in said State, as the northeast quarter of section twenty (20) in township number thirty-three (33) north, of range number seven east of the third (3d) principal meridian, containing one hundred and

sixty acres; also the southwest quarter of section number four (4) in township number thirty-two (32) north, of range number seven (7) east of the third (3d) principal meridian, containing one hundred and sixty acres; also the southeast quarter of section number twenty-nine (29) in township number thirty-two (32) north, of range number eight (8), containing one hundred and sixty acres, in all four hundred and eighty acres of land, more or less, together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversions and reversions, remainder and remainders, rent, issues, and profits thereof, and all the estate, right, title, interest, claim or demand whatsoever, of the said parties of the first part, either in law or equity, of, in, and to the above-bargained premises, with the hereditaments and appurtenances; to have and to hold the said premises
48 as above described with the appurtenances unto the said party of the second part, and his heirs and assigns forever. And the said Jeddiah Woolley, and Betsey Woolley, his wife, for themselves, their heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, and his heirs and assigns, that at the time of the ensealing and delivery of these presents they are well seized of the premises above conveyed as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law, in fee-simple, and have good right, full power, and lawful authority to grant, bargain, sell, and convey, the same in manner and form as aforesaid, and that the same are free and clear of all incumbrances, of what kind and nature soever, and that the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, will forever warrant and defend. In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JEDDIAH WOOLLEY. [SEAL.]
BETSEY WOOLLEY. [SEAL.]

Sealed and delivered in presence of—
WM. A. CHATFIELD.

STATE OF ILLINOIS, *ss:*

I, W. A. Chatfield, justice peace in and for the county of Will,
49 in the State aforesaid, do hereby certify that Jeddiah Woolley and Betsey Woolley, personally known to me as the same persons whose names are subscribed to the foregoing deed, appeared before me this day in person and acknowledged that *he* signed, sealed, and delivered the said deed, as their free and voluntary act for the uses and purposes therein set forth. And the said Betsey Woolley, wife of the said Jeddiah Woolley, being by me examined separate and apart and out of hearing of her husband, and the contents of the said deed having been by me made known and fully explained to her, acknowledged that she had freely and voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned, without compulsion of her said husband, and that she does not wish to retract the same. Given under my hand and seal at my office on this 30th day of August, 1839.

W. A. CHATFIELD, *J. P.* [SEAL.]

STATE OF ILLINOIS,
Will County, ss:

I, Levi Jenks, clerk of Will County commissioners' court in the State aforesaid, do hereby certify that William Chatfield, esq., whose name is subscribed to the certificate of acknowledgment or proof of the annexed deed and therein written, was at the time of taking such acknowledgment or proof an acting justice of the peace in and for said county, duly commissioned and sworn, and authorised to take
50 the same, and that full faith and credit is due to and of right should be given to all his official acts of justice. In testimony whereof I have hereunto set my hand and the seal of said court this the 6th day of February, A. D. 1840.

[SEAL.] LEVI JENKS, *Clerk.*

Filed February 18th, 1840.

STATE OF ILLINOIS,
La Salle County, ss:

I, Stephen Arnold, recorder of deeds in and for the county of La Salle, in the State of Illinois, and the keeper of the record thereof, do hereby certify that the above and foregoing is a true, full, and complete copy of deed as appears of record in my office in book number five (5) on pages numbered eighty-two (82), eighty-three (83), and eighty-four (84), of the records of said county.

Witness my hand and official seal at Ottawa, in said county, this eleventh day of June, A. D. 1879.

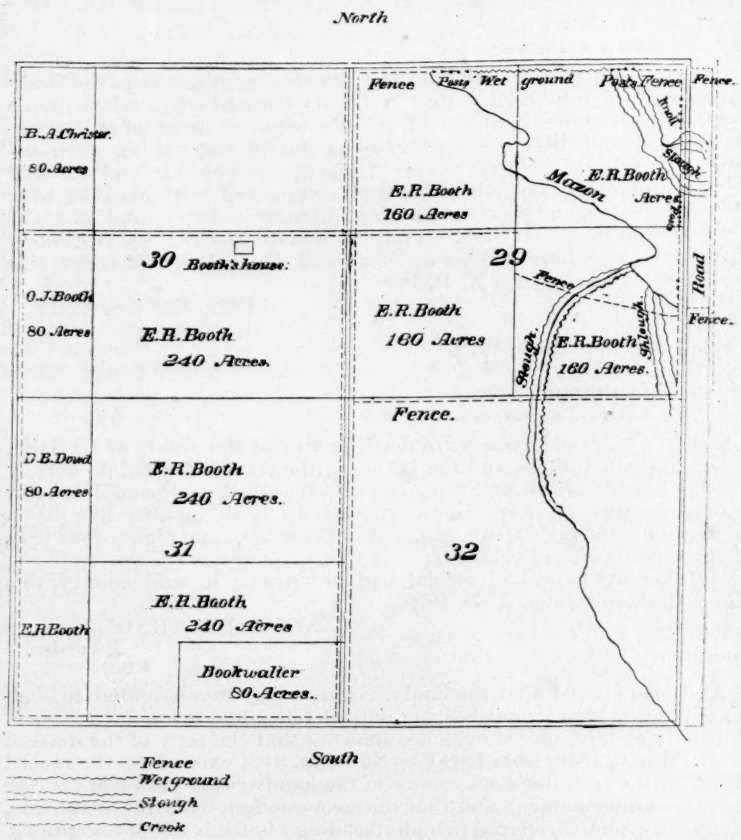
[SEAL.] STEPHEN ARNOLD,
Recorder.

And also proved that the land in controversy was patented to Jedediah Wooley by a patent bearing date October 1st, 1839.

The defendant offered evidence showing that the copy of the deed of May 6, 1840, from Lacey to Newman, as it existed on the record
51 in the recorder's office, was in the handwriting of a clerk in the recorder's office; and that the memorandum made in the records, a copy of which is referred to under heading 14 of this bill of exceptions, was in the handwriting of the recorder himself; and the defendant offered evidence tending to show that the clerk above mentioned was a careful, accurate copyist, and generally more correct in such work than the recorder himself.

The defendant offered in evidence the following diagram, and the same was offered and admitted by the court, not as containing an entirely accurate plat of section 29 and the adjoining sections, but simply as illustrative of the evidence hereinafter referred to.

(Here follows diagram marked page 51.)



52 The defendant offered evidence showing that one Stevens was living in section 30 as his tenant in 1868; that there was a traveled road between sections 29 and 30; that there was a fence on both sides of the road between these two sections; that there was also a fence on the south line of section 29; that there was a fence running from the west corner of the NW. and SW. quarters of section 29 across the quarters, which fence then turned south a short distance on the line between the SE. and SW. quarters of section 29, and extended over to the eastern boundary of the SE. $\frac{1}{4}$. There was a fence running from the SE. corner of section 29 north to Mason Creek, but not beyond. There was a north and south road, not much used, running on the east line of section 29; on the east side of that road was a fence; that on the northern boundary of section 29 there was a fence extending from the NW. corner of said section to Mason Creek; that east of Mason Creek on the northern line of section 29 a few posts were placed, but there were no boards or regular fence on that line; that there was a considerable space on the north line of the NE. $\frac{1}{4}$ of section 29 where there were neither boards nor posts, and that this space extended from

the NE. ¼ over a considerable portion (on the north line) of the NW. ¼ of section 29; that there was on the north line of the NE. ¼ of
53 section 29 a fence extending from the NE. corner of the quarter section west a short distance, and a few posts extending further west from the end of the fence. On the east line of the NE. ¼ of section 29 it was open, except as hereinafter stated, and on the north line of the NE. ¼ of said section there was, as has been stated, an open space, over both of which open spaces on the north line and east line of NE. ¼ sec. 29, cattle could come and go at all times from the prairie immediately adjoining. At this time, December 7th, 1868, the defendant claimed to be the owner of the land adjoining south and west of the land in controversy, and his tenant on section 30 worked that part of the section which he occupied on shares, and the defendant's tenant was in the habit of from time to time driving the defendant's cattle over on to the land in controversy for water during the fall and winter of 1868, and it appeared also that other parties watered their cattle there. In the spring of 1869 the land in controversy was enclosed with a fence and used by the defendant as a pasture. In the spring of 1873 the defendant built a house on the NW. ¼ of section 29 and moved into it with his family. There were a few panels of fence extending from the NE. corner of section 29 south.

The tenant on section 30, when interrogated whether he had charge of the land of the defendant, said he had charge of the land so
54 far as seeing to the fences and attending to the cattle when there was not anyone else there. When interrogated by the plaintiff as to whether such charge was that of any other neighbor he said that it was, and, when further interrogated by the defendant, he said that there was an understanding between him and the defendant that he should see to his cattle, and that it was not the charge of any other neighbor; he agreed to do it, and did it.

The plaintiff thereupon offered in evidence a certified copy of a deed from Jeddiah Wooley and wife to Ibzan Lacey, recorded on the 10th of September, 1839, of the land in controversy, as follows:

(Copy.)

This indenture mad' this day of . in the year of our Lord one thousand eight hundred and thirty-nine, between Jeddiah Woolley and Betsey, his wife, of Will County, and State of Illinois, of the first part, and Ibzan Lasey, of the town of Cairo, county of Green, and State of New York, of the second part, witnesseth:

That the said parties of the first part, for and in consideration of one thousand dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, aliened, and confirmed; and by these presents do grant, bargan, sell, remise, release, alien, and confirm, unto the said party of the second part, and to his heirs and as-
55 signs forever, all the following described pieces or parcels of land, situate, lying, and being in the county of La Salle, and State of Illinois, and described upon the government map in the land office at Chicago in said State as the northeast quarter of section twenty (20) in township No. thirty-three (33) north, of range No. seven (7) east of the third (3) principal meridian, containing one hundred and sixty acres; also the southwest quarter of section No. four (4) in township No. thirty-two (32) north, of range No. seven (7) east of the third (3) principal meridian, containing one hundred and sixty acres; also

the northeast quarter of section No. twenty-nine (29) in township No. thirty-two (32) north, of range No. eight (8) east, containing one hundred and sixty acres, in all four hundred and eighty acres of land, more or less. Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits hereof, and all the estate, right, title, interest, claim, or demand whatsoever of the said parties of the first part, either in law or equity, of, in, and to the above bargained premises, with the hereditaments and appurtenances; to have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part, and his heirs and assigns forever. And the said Jeddiah Woolley and Betsey, his wife, for themselves, their heirs, exec-
56 utors, and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, and his heirs and assigns, that at the time of the ensealing and delivery of these presents they are well seized of the premises above conveyed as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee-simple, and have good right, full power, and lawful authority, to grant, bargain, sell, and convey the same in manner and form as aforesaid, and that the same are free and clear of all incumbrances of what kind and nature soever, and that the above-bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming, or to claim, the whole or any part thereof, will forever warrant and defend.

In witness whereof the said parties of the first have hereunto set their hands and seals the day & year first above written.

JEDDIAH WOOLLEY, JR. [L. S.]
BETSEY WOLLEY, [L. S.]

Sealed and delivered in the presence of—
WM. A. CHATFIELD.

STATE OF ILLINOIS:

I, Wm. A. Chaskfield, justice of the peace in and for the county of Will, in the State aforesaid, do hereby certify that Jeddiah Woolley & Betsey Woolley, person'ly known to me as the same persons
57 whose names are subscribed to the foregoing deed, appeared before me this day in person and acknowledged that *he* signed, sealed, and delivered the said deed as their free and voluntary act, for the uses and purposes therein set forth. And the said Betsey Wooley, wife of the said Jeddiah Wooley, being by me examined seperate and apart, and out of the hearing of her husband, and the conten's of the said deed having been by me made known and fully explained to her, acknowledged that she had freely and voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned without compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and seal, at my office in , this 30th day of August, 1839.

WM. H. CHATFIELD, *J. P.* [SEAL.]

Filed Sept. 10, 1839.

STATE OF ILLINOIS,
La Salle County, ss:

I, Charles W. Denhard, recorder of deeds in and for said county,

do hereby certify that the foregoing is a true and correct copy of an instrument recorded in book 2 of La Salle County land records, pages 502, &c.

Given under my hand & official seal this 18th day of November, 1878.

[SEAL.] C. W. DENHARD,
Recorder.

58 The foregoing comprised all the evidence in the case. Thereupon the court found that the defendant had not been possessed by actual residence thereon before the commencement of this suit of the land in controversy for seven successive years; and the court further found that the title to the said land in controversy was in the plaintiff, and that the possession thereof was unlawfully withheld as alleged from him by the defendant.

To which opinion of the court in so finding the defendant then and there accepted.

A question having occurred wherein it was necessary under the 953d section of the Revised Statutes that the circuit justice should sign this bill of exceptions, it was stipulated between the counsel that it might be signed by the circuit judge, to have the same effect as though it had been signed by the circuit justice.

Exceptions allowed.

THOMAS DRUMMOND.

(Endorsed:) Filed Dec'r 13, 1879. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 23d day of December, A. D. 1879, said plaintiff, by his attorneys, filed in said clerk's office his bond in said entitled cause, which said bond is in the words and figures following, to wit:

59 *Bond.*

Supreme Court of the United States. Error to the circuit court in and for the northern district of Illinois.

EDWARD R. BOOTH, PLAINTIFF IN ERROR,
vs.
JOHN M. TIERNAN, DEFENDANT IN ERROR. } Ejectment.

Know all men by these presents that we, Edward R. Booth and Charles H. Goold, of the county of Grundy, and State of Illinois, are held and firmly bound unto John M. Tiernan, his heirs, executors, administrators, or assigns, in the penal sum of two thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 22d day of December, A. D. 1879.

Whereas the above bounden, Edward R. Booth has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the United States circuit court in and for the northern district of Illinois.

Now, therefore, the condition of this obligation is such, that if the above bounden Edward R. Booth shall prosecute the said writ
60 of error to effect and answer and pay all costs and damages, including also all damages due and to become due for the use of the premises during the pendency of this writ of error; if he shall fail

to make good his plea, then this obligation to be void; otherwise to remain in full force and effect.

EDWARD R. BOOTH. [SEAL.]
CHARLES H. GOOLD. [SEAL.]

Bond approved Dec'r 23, '79.

THOMAS DRUMMOND.

(Endorsed:) Filed Dec'b'r 23d, 1879. Wm. H. Bradley, clerk.

61 NORTHERN DISTRICT OF ILLINOIS, *sct:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause, wherein John M. Tiernan was the plaintiff, and Edward R. Booth was the defendant, as appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 24th day of September, A. D. 1880, and of our Independence the 105th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

62 UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

United States of America, to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between John M. Tiernan, plaintiff, and Edward R. Booth, defendant, in an action of ejectment, a manifest error hath happened, to the great damage of the said Edward R. Booth, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded if judgment be given therein, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, A. D. 1880, in the Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-third day of December, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104th year.

[SEAL.] WM. H. BRADEEY, *Clerk.*

(Indorsed:) Supreme Court of the United States. John M. Tiernan vs. Edward R. Booth. Writ of error.

63 UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

To John M. Tiernan, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second

Monday of October, A. D. 1880, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the northern district of Illinois, wherein Edward R. Booth is plaintiff in error, and John M. Tiernan is defendant in error, to show cause, if any there be, why the error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Thomas Drummond, this 4th day of September, in the year of our Lord one thousand eight hundred and eighty.

THOMAS DRUMMOND.

(Indorsed;) Supreme Court of the United States. Edward R.
64 Booth, pl'ff. in error, vs. John M. Tiernan. Citation to October term, A. D. 1880.

NEEDHAM & MILLER,
Att'ys for pl'ff in error.

I hereby accept service of the within citation on behalf of defendant in error, this day of September, A. D. 1880.

UNITED STATES OF AMERICA,
Northern district of Illinois.

STATE OF ILLINOIS,
Cook County, ss:

H. H. C. Miller, of the county and State aforesaid, being first duly sworn, deposes and says that he served the within citation on George Barry, the attorney of record of the defendant in error therein named, on the 4th day of September, A. D. 1880, in his the said Barry's office, in the city of Chicago, in the county and State aforesaid, by delivering a true copy of the within citation to the said Barry. Affiant further says that said Barry read the within citation in affiant's presence.

H. H. C. MILLER.

Subscribed and sworn to before me this sixth (9th) day of September, A. D. 1880.

[SEAL.] H. S. HODDORD,
U. S. Com'r.

65 And now comes the said plaintiff in error, and says that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error in this, to wit:

1. The court erred in admitting in evidence certified copy of the deed from Ibzan Lacey and wife, by Joel Wicks, their attorney in fact, to Alva Newman, dated May 6, 1840, set forth in bill of exceptions under "4."

2. The court erred in admitting in evidence certified copy of deed from Charles Tiernan and wife to John C. Murphy, dated Sept. 15, 1845.

3rd. The court erred in admitting in evidence a mortgage from John C. Murphy and wife to Seth C. Tiernan and Morris Jones, as executors of Michael Tiernan, dated Oct. 10, 1846.

4th. The court erred in admitting in evidence a certified copy
66 of the lost will of Michael Tiernan.

5th. The court erred in admitting in evidence each of the following deeds: Deed from Morris Jones, as sole surviving executor of Michael Tiernan, to John M. Tiernan, Michael Tiernan, and Margaret Jones, dated November 24, 1875. Deed from Michael Tiernan to John

M. Tiernan, dated Nov. 24, 1875. Deed from Francis Tiernan to John M. Tiernan, dated Nov. 24, 1875. Deed from Morris Jones and wife to John M. Tiernan, dated Nov. 12, 1875.

6th. The court erred in admitting in evidence certified copy of a page of memorandum made by the recorder, shown in bill of exceptions under "14."

7th. The court erred in admitting in evidence a transcript from the land office at Springfield, Illinois.

8. The court erred in admitting in evidence a receipt from the land office at Chicago, with the memorandum of Joel Wicks endorsed thereon.

9. The court erred in admitting the evidence of Gurdon Secor.

10. The court erred in admitting the testimony of Daniel B. Rork.

11. The court erred in finding that the plaintiff in error had not been possessed by actual residence thereon before the commencement of this suit of the land in controversy for seven successive years.

12. The court erred in finding the issue for the plaintiff.

13. The court erred in rendering the judgment aforesaid in manner and form aforesaid.

For which errors and each of them the plaintiff in error prays that the said judgment be reversed.

B. C. COOK,
Counsel for Pl'ff in Error.

(Indorsement on cover:) No. 640. Edward R. Booth, plaintiff in error, vs. John M. Tiernan. N. Illinois, C. C. U. S. Filed October 11, 1880.

109-205

OFFICE, SUPREME COURT U. S.
FILED
OCT 16 1883
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1883.

(No. 95.)

EDWARD R. BOOTH, JR., ET AL.,
Plaintiffs in Error,

vs.

JOHN M. TIRMAN,
Defendant in Error.

In Error to the Circuit Court of the United States, Northern District of Illinois.

Brief for Plaintiffs in Error.

B. C. COOK, . . CHARLES W. NEEDHAM,

Attorneys for Plaintiffs in Error.

CHICAGO:
HORACE O'DONOGHUE, BRIEF AND ABSTRACT PRINTER, 95-97 WASHINGTON ST.
1883.

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Plaintiffs in Error,

vs.

JOHN M. TIRMAN,
Defendant in Error.

In Error to the Circuit Court of the United States, Northern District of Illinois.

Brief for Plaintiffs in Error.

MAY IT PLEASE THE COURT:

This was an action of ejectment, brought by John M. Tiernan, defendant in error, against Edward R. Booth, plaintiff in error, in the Circuit Court of the United States of the Northern District of Illinois, on the 7th day of December, 1875, to recover possession of the northeast quarter of section 29, in township 32, north range 8, east of the 3rd P. M., in Grundy County, Illinois.

The plaintiff in error contended: First, that Tiernan had no title; second, that plaintiff in error had the title to said land; and third, that plaintiff in error had been pos-

sessed of said land, by actual residence thereon, for seven successive years, having a connected title deducible of record from the United States.

(A) Chain of title of record..

This land was entered by Jeddiah Woolley on the 8th day of August, 1835, and a patent issued to him from the United States, October 1, 1839. Afterwards, in 1839, Woolley conveyed said land by deed to Ibzan Lacey, and the 16th day of March, 1868, Ibzan Lacey, having died intestate, his sole heir-at-law, Sally C. Wickes, sold and conveyed said land by deed to James R. Stanley, and on the 6th day of August, 1868, James R. Stanley sold and conveyed said land by deed to Edward R. Booth, the plaintiff in error. All the foregoing deeds were properly recorded in the county where the land was situated.

(B) Possession.

Up to and at the time of the purchase by Booth, the land in controversy was unoccupied; Booth immediately went into possession of the land as follows (referring now to the plat shown upon page 24 of the printed record herein); Booth, at the time of his purchase, owned the south half and the northwest quarter of said section 29; also, the east three-quarters of the south half of section 30 adjoining; and also, other lands to the south of the piece last described. His house was located, as indicated on said plat, at the north line of the south half of section 30, in which his tenant, Stevens, resided. These lands were used largely for pasturage, Booth being in the stock business. There was a highway running between sections 30 and 29, fenced upon both sides, with gateways connecting the two. On the south line of section 29 there was a fence the entire distance, and also along the eastern boun-

dary, up to the land in question, with the exception that about midway, where there was a slough, there were nothing but posts set; there were other fences upon other portions of section 29, as indicated on the plat. As soon as Booth purchased this land, in 1868, he purchased materials and commenced enclosing it, extending the fence from the northwest corner of section 29 to the east about quarter of the way, and posts were set for some distance farther. Immediately at the northeast corner were a few panels of fence running each way, part running south and continuing, either fence or posts, down to a slough, and a fence ran also from the southeast corner up to the slough. There was also on the north line an open space of wet ground that could not be completed that fall.

During the fall and winter Booth's tenant resided, as stated, on section 30, and having entire charge of the land belonging to Booth, was in the habit of driving cattle over onto this piece of land for pasture and water. This enclosure, commenced and carried forward, as stated, in the fall of 1868, was wholly completed in the spring of 1869.

It will be noted further, that on the east line of said land there was a highway. This highway was fenced on the east side, opposite the land in question, and in the fall of 1868, Booth extended a fence across the highway at the northeast corner, and also about a quarter of the way north from the southeast corner of the section, so as to complete the enclosure, but including within it the road as indicated on the plat. This, however, left a space on the north that was not completely enclosed until the spring of 1869. Booth continued the possession and the residence by his tenant upon said lands, as stated, until 1873, when he built a house for himself upon the northeast

quarter of section 29, and moved into it with his family, and has there since resided. From 1868 to the spring of 1873 Booth's tenant resided upon said land, as stated, and controlling and managing the whole territory owned by Booth. From 1873 to the commencement of the suit, Booth resided upon the northeast quarter of section 29, and controlled and occupied the whole of said territory owned by him.

NOTE. The statute of Illinois, section 4, chapter 83, provides "that actions brought for the recovery of any "land," etc., "of which any person may be possessed by "actual residence thereon, for seven successive years, "having a connected title in law or equity, deducible of "record from this State or the United States, * * * "shall be brought within seven years next after possession "being taken, as aforesaid."

If Booth's possession by actual residence dates from the fall of 1868, when he commenced the enclosure as above stated, then this action is barred by this statute of limitations referred to. But if the possession was not complete until the spring of 1869, when the enclosure was completed, then the action would not be barred by this statute.

The defendant in error (plaintiff below) claims that Ibzan Lacey in his life-time conveyed this land by a deed to one Alba Newman, and that from Newman, through various persons, the title was conveyed to Tiernan. The deed from Lacey to Newman under which he claims, was dated the 6th day of May, 1840.

It was stipulated that the original deed was lost; and to show its contents, Tiernan offered in evidence a certified copy from the recorder's office of said deed. This deed, as shown by the copy, conveyed the southeast quarter of

said section 29. To the introduction of this deed the plaintiff in error objected, for the reason that it did not convey the land in controversy. Tiernan's counsel then stated to the court that there would be other evidence tending to show that there was a clerical error in the description of the land as entered upon the record and contained in the copy; that it should be the northeast quarter. The court below admitted the copy of this deed in evidence and afterwards admitted evidence which, it was claimed, tended to show that the original deed conveyed the northeast quarter. Plaintiff in error objected to the introduction of this evidence on the ground, first, that where the original deed was lost, the record was the best evidence of the contents of the deed, and when introduced by a party could not be contradicted by him; that under the statute of Illinois, in cases where a recorder's copy is properly introduced in evidence, it is made "of like effect as evidence as the original deed," and therefore could not be contradicted.

The court overruled these objections and allowed the defendant in error (plaintiff below) to introduce, for the purpose of contradicting a certified copy of the deed aforesaid.

First—A certified copy of the entry-book kept by the recorder.

Second—Testimony of two witnesses, Gurdon Secor and Daniel B. Rork, whose testimony is reported in full on pages 15, 16, 17, 18, 19 and 20 of the printed record. To the introduction of this evidence plaintiff in error duly objected, for the reasons above stated, and upon this evidence the court found that the title to said land was in Tiernan, and that the possession thereof was unlawfully withheld, and that Booth had not been possessed by actual residence

thereon, before the commencement of the suit, of the land in controversy for seven successive years. To this finding plaintiff in error excepted and moved to set aside such finding for a new trial for the reason; first, the court admitted on the hearing improper evidence on the part of the plaintiff; second, the court excluded on the part of the defendant proper evidence; third, the finding of the court is contrary to the law in the case; fourth, the finding of the court is contrary to the evidence of the case. This motion was overruled by the court, exception taken thereto, and the case brought to this court on writ of error.

Assignment of Errors.

1. The court erred in admitting in evidence a certified copy of the deed from Ibzan Lacey and wife, by Joel Wickes, their attorney in fact, to Alba Newman, dated May 6, 1840, set forth in bill of exceptions "4."

2. The court erred in admitting in evidence certified copy of deed from Charles Tiernan and wife, to John C. Murphy, dated Sept. 15, 1845.

3. The court erred in admitting in evidence a mortgage from John C. Murphy and wife to Seth C. Tiernan and Morris Jones, as executors of Michael Tiernan, dated Oct. 10, 1846.

4. The court erred in admitting in evidence a certified copy of the last will of Michael Tiernan.

5. The court erred in admitting in evidence each of the following deeds: Deed from Morris Jones, as sole surviving executor of Michael Tiernan to John M. Tiernan, Michael Tiernan and Margaret Jones, dated Nov. 24, 1875. Deed from Michael Tiernan to John M. Tiernan, dated

Nov. 24, 1875. Deed from Francis Tiernan to John M. Tiernan, dated Nov. 24, 1875. Deed from Morris Jones and wife to John M. Tiernan, dated Nov. 12, 1875.

6. The court erred in admitting, in evidence, certified copy of a page of memorandum, made by the recorder, shown in bill of exceptions, under "14."

7. The court erred in admitting in evidence a transcript from the land office at Springfield, Ill.

8. The court erred in admitting in evidence a receipt from the land office at Chicago with the memorandum of Joel Wicks endorsed thereon.

9. The court erred in admitting the evidence of Gurdon Secor.

10. The court erred in admitting the testimony of Daniel B. Rork.

11. The court erred in finding that the plaintiff in error had not been possessed, by actual residence thereon, before the commencement of this suit, of the land in controversy, for seven successive years.

12. The court erred in finding the issue for the plaintiff.

13. The court erred in rendering the judgment aforesaid in manner aforesaid.

The first five of the assignments of error are all included in the first, as they constitute the chain of title from Alba Newman, the grantee in the deed of May 6, 1840, which conveyed the southeast instead of the northeast quarter. The other assignments involve other questions, which will be discussed in the argument.

ARGUMENT.

The questions raised by the assignment of errors herein can be grouped under three general heads.

I. Can the certified copy of the deed of May 6, 1840, be varied or changed by parol testimony?

II. Is the evidence offered by defendant in error competent and sufficient to show that the deed of May 6, 1840, conveyed the land in question and that the recorder made a mistake?

III. Was the possession of the plaintiff in error, in the fall of 1878, a "possession by actual residence?" etc.

I.

Can the certified copy of the deed of May 6, 1840, be changed or varied by parol testimony in this action.

The original deed is lost, and therefore cannot be produced. There is a record of the deed made and kept by the Recorder of Deeds, pursuant to law, and that record, or a certified copy of it, is in evidence. The Statute of Illinois provides :

"*Laws 1861, 174. 21 Feb. § 1.* **38** ORIGINAL DEEDS BEING LOST.] Whenever, upon the trial of any cause in law or equity, in this State, any party to said cause, or his agent, or attorney in his behalf, shall orally in court, or by affidavit, to be filed in said cause, testify and state under oath, that the original of any deed, conveyance or other writing, of or concerning lands, tenements and hereditaments, which shall have been or may hereafter be acknowledged or proved, according to any of the laws of this State, and which, by virtue of the laws of this State, shall be required or be entitled to be recorded, is lost, or not in [the] power of the party wishing to use it on [the] trial of any such cause, the record of such deed, conveyance or other writing, or a transcript of the record thereof, certified by the recorder in whose office the same may have been or may hereafter be recorded, may be read in evidence

in any court in this State, with like effect as though the original of such deed, conveyance or other writing was produced and read in evidence."

The certified copy is, by this statute, made evidence of the contents of the deed—and with reference to its character as evidence the Legislature say "may be read in "evidence in any court in this State *with like effect as* "*though the original of such deed, conveyance or other* "*writing was produced and read in evidence.*" This language is clear and unequivocal. The word "effect" as defined by Webster, means (1) that which is produced by an agent or cause; result of agency or causation; consequence; and (3) power to produce consequences or results; force; importance, etc.

Statutes are to be construed according to the meaning of the words used.

Frye v. *C., B. & Q. R. R.*, 73 Ill. 399.
City of Beardstown v. *City of Virginia*, 76 Ill, 34.
Stuart v. *Hamilton*, 66 Ill. 253.

Therefore, when the Legislature say that the record or a certified copy thereof, when introduced in evidence, shall have "*like effect*" as the original, they mean that it shall have, not only like power or force to produce a consequence or result, but also that the like results or consequences shall follow and attend that which follow and attend the introduction of the original deed in evidence. Stronger or more explicit language could not be used to express the intention of the Legislature to make the certified copy, under the circumstances, providing for its introduction, as conclusive as the original. The Legislature certainly intended to accomplish something when this statute was

adopted. It could not have been the object *simply* to permit the record or a certified copy to be introduced, because that could be done under the common law; nor was it to create a presumption that the record was correct, for that presumption already existed; nor could it have been the object to make its production, together with the presumption of its correctness, *prima facie* evidence of the making and contents of a deed, for this also was the law long before the statute was adopted, and so we must look farther to find the objective point in the mind of the Legislature. The first new element we find in the statute is, the foundation it requires to be laid in order to introduce the record or a certified copy in evidence. How slight it is when compared with the strict rules of the common law upon that subject; and the fact that it is so, is evidence of the high character that the record obtained as evidence in the thought of the Legislature. The next and only other new feature, is this last clause, declaring the effect of the record or copy when introduced in evidence. "Shall have *like effect as though the original*" had been produced and read. It is said that the Legislature presumed that the record was a correct copy of the original, and upon this presumption, they made the law. This is undoubtedly true. It was done upon grounds of legal policy, to prevent controversy in collateral proceedings; but, it is said, inasmuch as the law-making power presumed the record was a correct copy, therefore, the rule does not apply, even in a collateral proceeding, when it is contended that the record is incorrect. This, we submit, destroys the rule. If it is to apply only in cases where there is no controversy, then there is no need of the rule. The common law presumption is just as good and conclusive as the legislative enactment, and nothing is accom-

plished by the statute. A rule is adopted to fix and settle rights and to conclude controversy. Take for illustration the rule so universally accepted, that no parol evidence can be admitted in a collateral proceeding to contradict or vary a written instrument. This rule has for its foundation the presumption of law, that the parties have correctly stated their agreement in the written instrument, yet we know that in very many cases this is not the fact, and suits in equity are brought to correct mistakes in written instruments; but would it be contended for a moment that because this rule is founded upon the presumption of law, that the writing correctly states the agreement of the parties, that, therefore, the rule would not apply in a case where it was claimed by one party that the writing was not correct?

It can be seen at once that such a doctrine would entirely nullify the rule. It is adopted to prevent controversy in collateral proceedings. It precludes the question whether or not the written instrument is correct, because it assumes that it is correct, and upon that assumption will not permit it to be contradicted. But it is said, "it is hard to made a party suffer because a recorder has made a mistake." This argument, if it is an argument, *assumes* that the recorder *has made* a mistake, when it is admitted the presumption of law is the other way. We might take the same language and use it as an argument in favor of the introduction of parol testimony to contradict a written instrument, and say it is hard to make a party suffer because the scrivener has made a mistake. But, we apprehend, the court in such a case would reply to us that if there was a mistake in the written instrument, we must adopt a *direct proceeding to correct the instrument*, and after having notified the opposite party of

the issue, try the question as to wnether or not a mistake had been made, and not attempt, in a collateral proceeding, to suddenly spring so important an issue without any warning of it whatever, and ask the court to suspend proceedings in the action at law, and try a chancery case without a bill or answer.

So in reply to the statement that it is hard to enforce the statute, we say if the party claims there has been a mistake, let him adopt a direct proceeding, and if he can show there has been a mistake let it be corrected. But let not the court annul the legislative act by refusing to give it effect on the ground of supposed hardships. The law presumes a fact, and upon that presumption creates a rule without making any exceptions to it, and we insist that the language of the statute is clear and unequivocal, and that the certified copy should have the *same effect* that the original deed would have if it had been offered and read in evidence. That the original deed could not be contradicted *in the part* wherein it is sought to contradict this record, is admitted.

Courts have given as great importance to copies of papers as is here claimed for this certified copy, and without any special enactment. In the case of the *Ill. Land Co.* v. *Bonne*, 75 Ill 315, a will was burned; an exhibit was attached to the bill, which a witness thought was a substantially correct abstract of the will; the exhibit was offered in evidence; there was proof that a copy of the will had been sent by mail to complainant at New Orleans, and of circumstances therewith which rendered it so probable that the copy was received. The court say: "We "think this exhibit should not have been received in evi- "dence in the absence, as there was, of any evidence

" accounting for the nonproduction of the copy or showing " its non-receipt."

And in the case of *Reed* v. *U. S. Ex. Co.*, 48 N. Y. 462, a receipt which constituted the contract was lost. Evidence of entries in a book, made at the time the package was received, was offered.

There was a copy of the receipt in evidence. The court say, the preliminaries of loss and comparison having been proved, the copy was legally of as high an order of proof as would have been the original. The entry could only be important as evidence to weaken or to alter the written contract already established. No case can be found, I imagine, nor any dictum which would authorize its admission for that purpose." See, also, *Hilts* v. *Colvin*, 14 Johns, 182, and 1 Greenleaf on Ev., sec. 84, note 2 (Rev. Ed.). Counsel for defendant in error, in the court below, cited some authorities, which will undoubtedly be cited in this court, and a reference to them here will not, therefore, be out of place, and may tend to make the position here taken more clear to the court.

The question of notice does not arise in this case, and therefore the cases cited in the 41st Illinois, p. 245, and 4 Bissell, 437, do not apply. The case of *Nixon* v. *Cobleigh*, 52 Ill. 389, does not support the plaintiff's position, because the only contradiction permitted by that decision was in a part of the record wherein the original deed could have been contradicted or explained. The court say : " There is no doubt that had the original been produced, executed as this purports to have been, and acknowledged by Samuel, as this from the copy purports to have been, it could be proved he executed the deed by the name of James instead of Samuel, his true name. We, *therefore*, can see no reason why, etc."

It would do violence to the rule governing the weight to be given an authority, to carry the conclusion of the court beyond the reason which it assigns as the basis of its conclusion. This case, therefore, does not hold that a certified copy of the record can be contradicted in a part wherein the original could not be contradicted or explained; but as they base their decision upon the fact that the original could be contradicted or explained as to the signature, it is a fair inference that the same court would hold that the record could not be contradicted in a part wherein the original deed could not be contradicted, if produced.

The case of *Wells* v. *Iron Co.* 48 N. H. 495, does not touch the question raised in this case. In that case plaintiff introduced a copy of a quit-claim deed from Willey to Thompson & Meserve. From the statement in the opinion (p. 534), it appears that this copy was from the county register's office. The deed was made by Willey as land commissioner, and a record was also kept in the office of the Secretary of State. There were, therefore, two public records of this deed. There was no statute declaring the effect of either as evidence to prove the contents of the deed, and the court held that the plaintiff might introduce one record, and the defendant might introduce the other. Both were literal copies, and the presumptions of law were as strongly in favor of the one as of the other; and they being different, the court left it for the jury to determine which one was correct; and it is difficult to see how this authority will in any manner justify the introduction of parol evidence by the plaintiff to contradict a record which he himself has introduced, and

which the law of this State has declared shall have *like effect* as the original deed.

The case of the *Cong. Church, &c.*, v. *Morris*, 8 Ala. 182, was one where the *plaintiff* introduced a certified copy of the record, then the *defendant* introduced the record itself, and they being different, the court held that a *certified copy* of a record may be shown to be incorrect, by comparing it either with the *original* record or with the *deed*. That does not touch the question at issue in this case. There the question was, can the *defendant* introduce the *original record* to prove the contents of a deed, when that *record* contradicts a *certified copy* of the same record, introduced by the plaintiff? In the case at bar the question is, can the *plaintiff himself* introduce *parol* evidence to contradict a record which he himself had introduced?

The case of *Seasmith* v. *Jones et al.* 13 Wis., cited by plaintiff, was not under a statute like our own, and the alleged mistake occurred only in the signature, and this, as we have heretofore seen, could have been explained or contradicted, had the original been produced.

The case of *Harvey* v. *Thorpe*, 28 Ala. 250, is the one most relied upon by the plaintiff to maintain his position. There is some difference between the Alabama statute considered in that case and the Illinois statute. The former in regard to the introduction of transcripts in evidence, reads, "Shall be received in evidence and be as good and effectual and available in law as if the original deed or conveyance had been produced and proved." The latter reads, "may be read in evidence in any court in this State with like effect as though the original of such deed, conveyance or other writing was produced and read in evidence."

The court say in the Alabama case under consideration: "That the Legislature has the power to do so" (to made the record as conclusive as the original) "is not denied, but we should require the use of the clearest and most unequivocal words to force us to such a conclusion." Now, the language of the Illinois Statute is clear, unequivocal.

If the position here taken be correct, then the judgment of the court below should be reversed, for the reason that the deed of May 6, 1840, did not convey the land, and all other evidence as to the contents of the original deed being incompetent, no title is shown in the defendant in error.

II.

Is the evidence offered by the defendant in error competent and sufficient to show that the deed of May 6, 1840, conveyed the land in question, and that the recorder made a mistake in recording as claimed?

In a court of equity, in a direct proceeding, it is held that the proof of a mistake in written instruments must be clear and satisfactory.

Shay et al. v. *Pettes et al.*, 35 Ill. 360.
Adams et al. v. *Robertson et al.*, 37 Ill. 45.
Emery v. *Mohler*, 69 Ill. 221.

There is a memorandum on the bottom of this certified copy, but the memorandum at the bottom of the certified copy of the deed is no part of the deed, unless it is shown to have been upon the *face* of the deed, and to have been there *at the time* the deed was executed. A record is simply a literal copy of the words of a deed and of the certificates attached to it. It is no proof of

the *location* of a note or memorandum upon the deed. In a record the acknowledgment follows and is directly under the deed, but in the original the acknowledgment is usually on the *back* of the deed. This memorandum in the record is below the signatures to the deed, and just before the acknowledgment. It may, therefore, have been upon the back of the deed with the acknowledgment, and may have been placed there after the deed was executed, and without the knowledge and authority of the grantors. Its being upon the record would only, at most, raise a presumption that it was somewhere on the deed, when it was actually recorded at length upon the record, and this was many days after it was executed.

The next item of evidence is a certified copy of an entry book kept by the recorder, in which, under date of May 14, 1840, appears this entry: "Lacey Ibzan to Alva Newman, N. E. ¼ S. 29, T. 32, N. R. 8, E. 3d P. M."

Let us see whether this paper is properly in evidence. Is it made evidence by the statute for any purpose, and if so, for what?

The statute is as follows:

Section 11, (Chap. 115): "When any instrument in writing is recorded in the recorder's office, the recorder shall indorse upon such instrument a certificate of the time (including the hour of the day) when the same was filed for record (which shall be considered the time of recording the same), and the book and page in which the same is recorded, which certificate shall be signed by the recorder and shall be evidence of the facts therein stated."

Section 12.—"Every recorder shall keep the following books:

"*First*—An entry book, in which he shall immediately on the receipt of any instrument to be recorded,

enter in the order of its reception, the names of the parties thereto, its date, the day of the month, hour and year of filing the same, and a brief description of the premises, indorsing upon such instrument a number corresponding with the number of such entry.

" *Second*—A grantor's index, in which shall be entered the name of each grantor in alphabetical order, the name of the grantee, date of the instrument, time of filing, kind of instrument, consideration, the book and page in which it is recorded, and a brief description of the premises.

" *Third*—A grantee's index, in which shall be entered the name of each grantee in alphabetical order, the name of the grantor, date of the instrument, time of filing, kind of instrument, consideration, the book and page in which it is recorded, and a brief description of the premises.

" *Fourth*—An index to each book of record, in which shall be entered in alphabetical order the name of each grantor and grantee, and the page in which the instrument is recorded.

" *Fifth*—When required by the county board, an abstract book, which shall show by tracts every conveyance or incumbrance recorded, the date of the instrument, time of filing the same, the book and page where the same is recorded, which book shall be so kept as to show a true chain of title to each tract, and the incumbrances thereon, as shown by the records of his office.

" *Sixth*—An index to recorded maps, plats and subdivisions ; such index to be made by description of land mapped or subdivided by range, township, section, quarter-section, etc."

This statute was passed only for the purpose of fixing the time when any given paper was filed for record, and never was intended as proof of the contents of the deed.

A copy of this entry book is not made evidence by statute. A sworn copy would be evidence at common law, but no such copy is in this case.

The statute makes the certified copy of record evidence when the original is lost or out of the power of the party wishing to produce it; clearly showing that the statute is restricted to some paper which may be copied on the record, and then the transcript of the *original deed, conveyance* or *other writing* may be read in evidence. This copy of entry book is not a transcript of any original deed, conveyance, or other writing.

But it is said the law requires such an entry to be kept, and therefore a certified copy is evidence.

If it were not for this statute, the contents of that deed could be proven only after the deed had been traced to its last custodian, and it had been shown that careful search had been made for it in all places where it would have been likely to have been kept.

But so great credit is given to the record that all these safeguards are dispensed with, and the record may be read with the slight foundation of secondary evidence specified in the statute. The reason for this rule is undoubtedly the fact, that while the authorities all unite in saying that the greatest care is necessary to prevent injustice in proving lost writings by parol, yet a record has so many safeguards thrown about it, is so almost certain to be right, that the care necessary to prevent injustice by the use of oral proof may safely be dispensed with. In other words, the record may be used (because great faith

and credit ought to be given to official records) without the strict preliminary proof required before oral evidence can be admitted; and then it is said by counsel for plaintiff that oral evidence and the certified copy of the entry book, with no preliminary proof, may be admitted to show that the record is entitled to no faith and credit at all.

This memorandum made by the recorder, is certainly not to be taken to contradict the record, which is by statute made the best evidence of the contents of the deed. For aught we know, the recorder may have made this memorandum from the memorandum at the bottom of this deed, "This land was entered by Jeddiah Woolley," etc., and finding that Woolley entered the northeast quarter, assumed to judicially determine that that memorandum was a part of the deed, and therefore a part of the description, and in making his memorandum to disregard the description in the body of the deed; but when the deed is recorded at length, then the fact appears that it purports to convey the southeast quarter.

The only other evidence introduced by plaintiff on the subject is the testimony of the witnesses Secor and Rorke. Secor says that in 1840 he drew a deed for Alva Newman to a man by the name of Tiernan. He says, in answer to the third direct interrogatory: "Alva Newman he brought me a deed, and wished me to draw another from it." He is then asked: "Did he give you any other memorandum of the land to be conveyed than the description in the deed he brought you?" To which he answers: "He did not." No other description is given of the deed from which the witness took his description than the statement: "He brought me *a deed.*" There had been several conveyances prior to the one in

controversy, and the statement that it was " a deed " in no way points to the deed in controversy. (*See Printed Record, pp. 15, 16 and 17.*) Such evidence is entitled to no weight as against the record.

Branson v. *With*, 17 Wallace, 32.

The testimony of the witness Rorke is simply that sometime he had the deed from Lacey to Newman and from Newman to Tiernan, and examined them, and thought they were all right. But on cross-examination (7th cross-int.) he is asked: " Did you compare the two deeds, sentence by sentence and word by word? " and witness answered, " I can't say that I did. (*See Printed Record p. 18, 19 and 20.*) We submit that the evidence is not clear and satisfactory that the deed in controversy conveyed the N. E. ¼, and would not be sufficient *in equity* to show a mistake.

Against this evidence, the defendant introduced the testimony of several witnesses—old residents of La Salle County, who examined the original record, and testified that the *record* of the deed in controversy, is in the handwriting of one Christopher Champlin ; that he was, at the time the record was made, a careful and experienced copyist; that the entry in the entry books is in the handwriting of one Armstrong, a farmer by occupation, but who had, through his political influence, been elected recorder. Several of the witnesses have been recorders of LaSalle County subsequent to Armstrong's term, and have had occasion to examine the records kept under the administration of Armstrong, for the purpose of making abstracts, etc. ; that they never have found any mistakes in the records kept by Champlin, but have not found the records made by Armstrong as correct, and all

unite in saying that Champlin was a much more careful and accurate copyist than Armstrong. This is shown by the fact that his entry in the entry book does not contain all the facts then required by the law.

Defendant further shows that in the land index book, kept also by the deputy Champlin, this deed is entered as a conveyance of the *S. E.* ¼. It is further shown, also, that it is and has been the custom in the Recorder's office of LaSalle County to compare the record after it is written with the deed, but not to compare the entry book with the deed. This testimony, together with the record, seems irrefragable.

III.

RESIDENCE UNDER THE STATUTE OF LIMITATIONS OF 1835.

The statute reads as follows:

"Actions brought for the recovery of any lands, tenements, or hereditaments, of which any person may be possessed by actual residence thereon, having a connected title in law or equity deducible of record, from this State or the United States, or from any public officer or other person authorized by the laws of this State, to sell such land for the non-payment of taxes, or from any sheriff, marshal, or other person authorized to sell such land on execution, or under any order, judgment or decree of any court of record, shall be bought within seven years next after possession being taken as aforesaid; but when the possessor shall acquire such title after taking such possession, the limitation shall begin to run from the time of acquiring title."

Sec. 4, chap. 83, Rev. Stat. of Illinois.

A party may reside upon one section and extend that residence over upon another.

Williams v. *Balance*, 23 Sel. 193.
Gregg v. *Forsythe*, 24 Howard (1 and 2d Black), 59.
7 Marshall (Ky.) 542.

Stanley purchased this land in controversy in March, 1868, and leased it to his tenant residing upon an adjoining quarter, viz., S. E. ¼ 29, and commenced to inclose the whole section 29. In October, 1868, the defendant completed the purchase of the entire section 29, including the land in controversy which he purchased from Stanley. At this time all the four corners of the section were fenced. A fence also ran across the entire south and west side of this section, also a part of the way across the north and east sides The northeast corner was clearly distinguished by a fence running south and west from it, and other fences were upon the section. And the tenant of Stanley had been actually residing upon the section during the summer of 1868, and continued such residence until the spring of 1869.

The defendant owned, and by his tenant Stephens resided upon, the adjoining section 30, and immediately upon his purchase connected secton 29 with section 30, by putting in gates in the line fences between the sections, and thereafter daily drove his cattle, 150 or more in number, from section 30 onto section 29; and in the following spring, 1869, he completed the entire enclosure with a board fence, the material for which he hauled onto the land in controversy in the fall of 1868.

In 1872 defendant built a house upon section 29, where he has resided ever since.

Since 1872, he states, he has controlled and managed his whole farm, consisting of section 29 and parts of sections 30 and 31, all adjoining (see map) from his residence on section 29, and that prior to that time and since October, 1868, he managed and controlled his farm, consisting of the same lands, from his residence on section 30, occupied by his tenant Stevens. Stevens testifies to the same facts.

We insist that a party actually residing upon one section may extend his residence over and upon an adjoining section, and that such residence upon the adjoining section so acquired begins when he *commences* to extend his improvements over the adjoining section, and exercises control over it under his title, provided he continues such improvements to completion. The statute does not begin to run from the *completion* of the improvements, but from the time of their *commencement* under the title.

It has been generally held that the residence and possession of land for seven years by a tenant inures to the benefit of the landlord, so as to secure to him the protection of the act; and that this protection is not confined to the particular close upon which the claimant resides, but also extends to the entire parcel of land of which the legal possession has been maintained as a consequence of his actual possession and residence.

Gregg v. *Forsyth*, 24 Howard, 179.
Williams v. *Ballance*, 23 Ill. 193.

Nothing can be more clear than that a fence is not indispensable to constitute possession of a tract of land. An entry into possession of a tract of land, under a deed containing specific metes and bounds, gives a constructive possession of the whole tract, if not in any adverse pos-

session, although there may be no fence or enclosure around the ambit of the tract, and an actual residence only on a part of it. To constitute *actual* possession, it is not necessary that there should be any fence or enclosure of the land, etc.

Ellicott v. *Pearl*, 10 Pet. 412.

One entering under color of title by deed, is deemed to have taken possession co-extensive with the bounds of the deed; that is, of *all* the land conveyed by the deed, if not in any adverse possession.

Brobst v. *Brock*, 10 Wall. 532.

We submit, in conclusion, that it has always been the policy of the law to encourage actual settlers, and to protect and maintain the rights of citizens who have made improvements, and who have paid government taxes upon the land.

Stale claims are never favored (in equity), and where gross *laches* is shown and unexplained, acquiescence in the operation of an adverse right, courts (of equity) frequently treat the lapse of time, even for a shorter period than the one specified in the Statute of Limitations, as a presumptive bar to the claim.

Statutes of Limitations are everywhere regarded as conducive, and even necessary, to the peace and repose of society.

Godden v. *Kimmell*, 9 Otto. (99 U. S.) 201.

Long acquiescence and *laches* by parties out of possession are productive of much hardship and injustice to others, and cannot be excused, except by showing some

actual hindrance or impediment, caused by the fraud or concealment of the party in possession, etc.

Wagner v. *Baird*, 7 How. 234.
Lansdale v. *Smith*, 16 Otto (106 U. S.) 392.
See, also, *Willett* v. *Fister*, 18 Wall. 96.

(The cases above cited are equity cases, and, therefore, the principle announced may not be strictly applicable to a common law case, but go to show the disfavor with which courts view stale claims and the suspicion that attaches thereto; and the disposition of courts to withhold relief from those who have delayed for an unreasonable length of time in asserting their claims.)

In this case the plaintiff in error is the actual settler. He has made all the improvements, has paid all of the taxes since and including the year 1868, and should be protected in his purchase, and all reasonable presumptions and inferences should be made in *his* favor, and not in favor of the defendant in error, who is a stranger to the land, and so far as the record shows, to the title.

For the reasons here stated we respectfully ask that the judgment of the court below be reversed.

Respectfully submitted,

B. C. COOK AND
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Attorneys for Plaintiffs in Error.

109-205

OFFICE SUPREME COURT U.S.
FILED
OCT 27 1883
A. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, A.D. 1883.

Edward R. Booth, et al,
Plaintiffs in Error,
vs.
John M. Tiernan,
Defendant in Error.

No. 95.
Writ of Error to the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT FOR DEFENDANT IN ERROR.

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1883.

Supreme Court of the United States.

OCTOBER TERM, A.D. 1883.

Edward R. Booth, et al,
Plaintiffs in Error,

vs.

John M. Tiernan,
Defendant in Error.

No. 95.
Writ of Error to the Circuit Court of the United States for the Northern District of Illinois.

ARGUMENT FOR DEFENDANT IN ERROR.

WM. BURRY,
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ARGUMENT FOR DEFENDANT IN ERROR.

This was an action in ejectment brought by Tiernan against Booth, to recover the North-east quarter of section 29, etc. There was a common source of title, Ibzan Lacey, who held title to the land in 1839, (record p. 10). In 1839 that title passed to Alva Newman, and in 1840 from Newman to the Tiernan family, where it has been ever since. At one time it was held by J. C. Murphy, but he was a member of the Tiernan family. The title was a clear and simple one and no controversy could ever have arisen concerning it; no one would ever have thought of trying to pick a flaw it, had it not been for a mistake about the deed from Lacey to Newman. The record of that deed as it is found in the office of the recorder of deeds, described the property conveyed as being the "South-east" quarter of section 29. The principal question in this case is whether

that deed conveyed the North-east or the South-east quarter. It is stipulated that the original Lacey-Newman deed is lost without fault of any party, (record p. 10).

The contention of the plaintiff, Tiernan, was that the description of the land in the original Lacey-Newman deed was the North-east quarter, and that the recorder made a mistake in recording it, making it read, "South-east" quarter. The position taken by Booth, defendant, was that the plaintiff was bound by the record, and could not be permitted to show that the recorder made a mistake.

In order to prove the Lacey-Newman deed, and that it conveyed the North-east quarter, plaintiff introduced in evidence, first, a certified copy of the deed from the recorder's office, (printed rec. p. 10); second, a certified copy of the page of the recorder's entry book from the recorder's office where the deed was recorded, (printed rec. p. 14). In the entry book appears the entry made by the recorder of the Lacey-Newman deed, and the description of the property therein is "N. E. $\frac{1}{4}$" etc.

The recorder was required by law to keep this entry book, just as much as the record book for the recording of the deed at length. The law in force at the time this deed was entered for record, provided that, "Every recorder shall keep a fair book, in which he shall immediately make entry of every deed or writing brought into his office to be recorded, mentioning therein the date, the parties, *and the place where the lands, tenements or hereditaments granted or conveyed by the said deed or writing are situate*," etc. The entry book introduced in evidence conforms strictly to the statute. Under the law the entry book was just as much a public record as the book wherein the deed was copied *in extenso*, and these two records show a discrepancy in the description of the property conveyed. The description put

in the entry book is the briefest possible to tell "where the lands * * * are situate," and yet under our system of land surveying, a complete description is thereby given.

Plaintiff then introduced other evidence to show that the description as given in the entry book was the description contained in the deed, and that the recorder made a mistake in copying when he made the complete record read "South-east quarter." By the evidence of the witnesses, Secor and Rorke, (printed rec. pp. 15–20), it appears that Secor was the Justice of the Peace who drew the deed from Newman to Tiernan, in which the land was properly described as the "North-east quarter." Secor remembers drawing the Newman-Tiernan deed, which was the one following the Lacey-Newman deed containing, it is alleged, the mistaken description. Secor testifies that he copied the description in the Newman-Tiernan deed from the description in the deed brought to him, which it is plain from Rorke's testimony was the Lacey-Newman deed. From the testimony of these two witnesses it is perfectly plain that the description in the Newman-Tiernan deed was copied from the description in the Lacey-Newman deed, and then that the descriptions in the two deeds were compared and found to correspond by at least three men, Secor, Rorke and Tiernan. It is not disputed that the description in the Newman-Tiernan deed was the North-east quarter.

At the foot of the Lacey-Newman deed, (record p. 11), appears a memorandum as follows: "This land was entered by Jeddiah Wooley, August 8th, 1835." The plaintiff in connection therewith offered a transcript from the U. S. land office, at Springfield, Illinois, showing that Jeddiah Wooley entered the N. E. $\frac{1}{4}$ on August 8, 1835, and that some other person entered the S. E. $\frac{1}{4}$, (item 15 on record p. 15).

The plaintiff next offered in evidence a receipt from the Chicago land office, dated August 8, 1835, showing that Wooley entered the N. E. ¼ of section 29 on that day. Indorsed on that receipt, in the handwriting of Wicks, the attorney in fact, of Lacey, was: "Sold this to Alva Newman May 6th, 1840." (Item 16, on record p. 15.)

In the same connection was also to be considered that all the subsequent deeds in the Tiernan title conveyed the North-east quarter, and no question was raised as to their ownership till the defendant, Booth, intermeddled in the title. There are several deeds made between the members of the Tiernan family, including J. C. Murphy's family a short time before the commencement of this suit, for the purpose of clearing up outstanding fragments of title.

The title of the defendant, Booth, arose in this way: In 1868 Sallie C. Wickes, the sole heir-at-law of Ibzan Lacey, deceased, (printed rec. p. 5), for $200 quit-claimed the land to one Stanley, who, the same year, conveyed it to Booth, the defendant.

As bearing upon whether or not the description in the Lacey-Newman deed was North-east or South-east quarter, defendant introduced a certified copy of a deed from Woolley to Lacey purporting to convey the South-east quarter, (printed rec. p. 21). To rebut this, plaintiff introduced a certified copy of what is very plainly the same deed without the certificate of the clerk of the court, (printed rec. p. 25), which purported to convey the North-east quarter. These are evidently copies of the same deed. The same mistakes occur, the same peculiarities of phraseology, the same property conveyed, and it was evidently re-recorded to show the certificate of the clerk.

Defendant's evidence (printed abst. pp. 21 and 23) shows that the entry-book above discussed was the regular entry

book kept at the time to which it refers. The defendant, Booth, also introduced some evidence as bearing on the general accuracy of the recorder, etc., which, however, was very meagre, and as given in the record, pages 21 and 23, shows nothing bearing on the case. Nothing whatever appears in the record as to what was in the index book.

As to the weight of the evidence, both plaintiff's and defendant's, on the true reading of the Lacey-Newman deed, we understand this court has nothing to do. The evidence was such as to leave no doubt whatever in the mind of any person but that the original Lacey-Newman deed did describe and convey the North-east quarter. The facts of the case were, however, found finally by the court below, and the only question to be considered here, is whether any improper evidence was admitted. Any discussion on the relative weight of evidence, or on the defendant's evidence at all, *either as to competency or weight*, is superfluous. Whether the recorder or his clerk was the more accurate was found as a fact by the court below.

The only question to be considered then, in regard to plaintiff's case, is: Did the court err in permitting us to prove that the recorder made a mistake in recording the deed, and that the original Lacey-Newman deed described and conveyed the North-east quarter?

The entry book, a page of which was offered in evidence, was required by statute to be kept just as much as the record book, and the two records, the entry book and the record, were of the same degree of evidence. If we were bound by one, they were equally bound by the other.

As early as A.D. 1795, the statute required the recorder to keep such a book and substantially the same provision is still in force in this state to-day. The section of the statute regarding entry books in force when this deed was re-

corded, being section seven of the act of January 8, 1829, was as follows:

"Every recorder shall keep a fair book, in which he shall immediately make entry of every deed or writing brought into his office to be recorded, mentioning therein the date, the parties, and the place where the lands, tenements or hereditaments granted or conveyed by the said deed or writing are situate, dating the entry on the day on which such deed or writing was brought into his office, and shall record all such deeds and writings in regular succession, according to the priority of time of their being brought into said office, and shall also make and keep a complete alphabetical index to each record book, showing the page on which each instrument is recorded, with the names of the parties thereto; he shall give a receipt to the person bringing such deed or writing to be recorded, bearing date on the same day as the entry and containing the abstract as aforesaid, for which entry and receipt he shall be entitled to no fee or compensation whatever."

COMPETENCY OF THE EVIDENCE OFFERED TO PROVE THE CONTENTS OF THE LACEY-NEWMAN DEED.

There are two ways of considering the competency of the evidence proving the deed which it was stipulated was lost. 1st, as secondary evidence at common law, introduced to prove the contents of a lost deed. 2d, as the introduction of a certified copy under the statute making such copies evidence, with evidence to show a mistake by the recorder. Considered in either way it was clearly competent.

Its Competency at Common Law.

The certified copies from the deed and entry-book were at common law the most satisfactory kind of secondary evidence.

Wells v. *Iron Co.*, 48 N. H., 534.
Winn v. *Paterson*, 9 P., 670.

"In this State it has been held if a deed has been recorded a transcript may be introduced, the party offering it making

oath that the original was not in his custody and was beyond his control, and this *independent of any statute.*" "The transcript is regarded as the highest and most satisfactory degree of secondary evidence." *Bowman* v. *Wettig*, 39 Ill., 422.

"Secondary evidence being admissible, any evidence tending to prove the existence and contents of the original, might be introduced, as, for example, a rough copy; or proof of the fact and contents might be given by parol evidence. Had the register been the scrivener, and instead of recording the bond, had kept a loose copy of it for his own satisfaction, such copy would have been good secondary evidence." "We are therefore of opinion that the copy was rightly admitted, not because the fact of being recorded gave it any superiority over other mere copies, but because the case was one in which secondary evidence was admissible." *Stetson* v. *Gulliver*, 2 Cush., 498.

The copy from the entry-book which the recorder was by statute required to keep, was, at common law, competent to prove the contents of the entry-book.

Lane v. *Bommelman*, 17 Ill., 96.

U. S. v. *Percheman*, 7 P., 85.

The sixth objection by defendant to the introduction of the copy from the entry-book (printed rec. p. 15) is that it does not appear that the book from which the copy is taken was the entry-book kept as required by law at the time the entry was made. This objection, if good at all, is met by the evidence on printed rec. p. 21, where testimony was introduced concerning the same entry-book, and it was stipulated that it was part of the original records of La Salle Co., in which this land was then situated.

The principles of law determining the competency of the other evidence introduced to sustain the issue formed, as secondary evidence at common law, are too well settled to need even mention. The evidence therefore being competent, the findings of the court below on that evidence cannot be questioned here, but must stand as conclusive.

U. S. v. *Dawson*, 101 U. S., 569.

Counsel for plaintiff in error have never, to our knowledge, attempted to show any objection to the competency of this evidence at common law. It is stipulated that the original deed is lost. Then, independent of any statute, the records and the other evidence are introduced to show the contents of a lost deed. To this view of the evidence, sufficient in itself to establish the lost deed, no objection has ever been urged.

Competency of the evidence under the statute making certified copies evidence.

A mistake of the recorder cannot prejudice our rights or title. In *Nattinger* v. *Ware*, 41 Ill., 247, the court say:

"This record presents the single question whether a deed, properly executed and acknowledged, and filed for record on the 31st day of October, 1837, *but recorded with a misdescription of the premises*, will protect the grantee against subsequent purchasers and incumbrancers."

The court then proceeds to hold expressly and positively that the party has done his whole duty in leaving the deed for record, and that he cannot be prejudiced by the mistake of the recorder. To the same effect is *Polk* v. *Cosgrove*, 4 Biss., 437.

It may be shown that the recorder made a mistake, and his mistake is not conclusive on us when we use the record as evidence. This necessarily follows from the proposition that a mistake of the recorder cannot prejudice our rights.

In *Nixon* v. *Cobleigh*, 52 Ill., 389, plaintiff in proving his title in ejectment had occasion to prove a deed signed, as he claimed, "Samuel H. Turrill." The original not being in his possession or power, he introduced, under the statute, a copy from the recorder's office. But the copy so introduced purported to be signed by "James H. Turrill." Against the objection of defendant, he was allowed to prove by parol evidence that the recorder had made a mistake, and

that the original was signed "by the name of Samuel H. Turrill." The court say on page 390: "This renders it morally certain that *the recorder made a mistake in transcribing the original upon his records.*" "We, therefore, see no reason why it could not be proved by a person who knew how the deed was, in fact, signed, that it was signed by the name of Samuel H. Turrill." In answer evidently to some suggestion by counsel, the court say that even if a party signs a deed by some other name, the signature is his. But that was merely argument. The decision is positive that it can be shown that a recorder misrecorded a deed.

We think this case absolutely conclusive of right to introduce evidence as was done in this case. It is much stronger than necessary, for in the case before the court we have two records of our deed, the entry-book and the full record, of equal dignity, but differing in description. We certainly had the right to show which is the correct one.

"The record from the Secretary of State's office of the deed from Willey to Thompson and Meserve was properly introduced, and also the record from the Coos county registry. The original deed was lost, and these both were or purported to be copies of said deed, but they differed in the description of the grant in a material point. Both were secondary evidence of the contents of the deed, and upon all this secondary evidence it was for the jury to find what the original deed was."

Wells v. *Iron Co.*, 48 N. H., 534.

It is contended for plaintiff in error that, having used the certified copy of the Lacey-Newman deed, the statute provides that it is to have the same force and effect as the original would have, and we are therefore bound by it. This argument seems to forget that we also use another record of equal dignity, the entry book. In prescribing the effect to be given to a certified copy of a deed, the legislature must have had in view that the recorder would make a true

transcript. This point is very fully discussed in *Harvey* v. *Thorpe*, 28 Ala., 262. The Alabama statute prescribed that a certified copy of a deed from a recorder's office should "be as good and effectual and available in law as if the "original deed or conveyance had been produced and "proved." There, as here, the recorder made a mistake in the description, and there, as here, it was contended that the party was bound by the mistake of the recorder when he introduced the copy in evidence, and could not show by parol what the description in the original deed was. But the court below admitted the evidence and the court above sustained the action of the court in that regard, and said:

"In giving to the record the same degree of force that the original deed would have had, it was doubtless presumed that the clerk would make a true copy, 'word for 'word,' as another section of the act requires him to do; and we think it was only the record when thus made that it was intended to invest with unimpeachable verity. In other words, to make it a record it must be a copy. Even judicial records, made under the sanction of judicial officers, and in themselves originals, have not always been held conclusive as to jurisdictional facts. Here the act contemplates nothing but a copy, and it is to this copy, when made by the clerk, that it was the intention of the law to accord unimpeachable verity. It is *prima facie* evidence on the ground that all officers must be presumed to have discharged the duties which the law requires of them; and the statute also dispenses with any further proof of the execution than the production of the record or transcript. But we are satisfied that it could never have been intended to make the record as effectual as the original unless it was a true copy, and we must therefore hold that it is not conclusive."

The words of the Alabama statute prescribing the force to be given a certified copy are fully as strong as those of the Illinois statute.

To the same effect are the cases of *Sexsmith* v. *Jones*, 13 Wis., 631, and *Congl. Church* v. *Morris*, 8 Ala., 182.

The statute requiring the entry book to be kept is older than the State of Illinois. The acts of 1795, 1807 and 1829 (the one in force when this deed was recorded and which continued in force till 1874), required every recorder to keep an entry book, mentioning among other things, "the "place where the lands * * * conveyed by the said deed or "writing are situate." The revision of our statutes in 1874 changed the requirement to giving "a brief description of "the premises." We insist the requirements are equivalent. To give the place where the land conveyed is situate is to locate the land; or as more commonly but also more ambiguously expressed, to describe the land. The entry in the entry book in this case was certainly a compliance with the statute and was so intended by the recorder.

In the case of *Merrick* v. *Wallace*, 19 Ill., 486, a question arose about the recording of a deed on December 30, 1835, in the office of the very same recorder where was recorded the Lacey-Newman deed. The entry book was mutilated and the page on which would have appeared the entry was gone. There was a mistake in the full record of the deed, and a subsequent grantee claimed that he should not be held to notice of the conveyance inasmuch as the recorder had made a mistake. But the court held that the first grantee had performed his duty in filing the deed for record and could not be prejudiced by a mistake of the recorder if he had made one; and, moreover, that it was the *duty* of this very recorder to enter the deed in the entry book, that it was to be presumed he had done so, and that although the page had been abstracted from the entry book, yet it still remained notice. This was a very plain decision that the entry book is a public record required by law to be kept and of equal dignity with the record of the deed *in extenso*. On page 496 the court say:

"But assuming the deed was not properly recorded in the first instance, we then say that it is sufficient the deed was left for record by the grantee. He performed his whole duty in so leaving it with the recorder, and though there is no entry of that fact to be found, the mutilation of the entry book, as proved, sufficiently accounts for it, and the grantee has a right to urge, taken in connection with the recorder's certificate on his deed and the record of the deed, that the abstracted leaves did contain evidence of the filing for record of his deed, and on the further principle that the law presumes the recorder performed his duty in that regard by entering it on his book as filed for record."

In speaking of keeping an entry book under the same act under which the entry book in this case was kept, the court say, in *Cook* v. *Hall*, 1 Gilm., 579:

"The law *requires* this book to be kept for the purpose of furnishing information to purchasers and creditors." "It is the duty of the recorder to comply strictly with this requisition of the statute." "All the party can do in order to have his deed recorded is to take it to the office and deliver it to the recorder. When he has done this he cannot be charged with any default or negligence."

In speaking of an entry book and index book in *Alvis* v. *Morrison*, 63 Ill., 181, the court say, on page 184: "The "statute requires the recorder to keep such books in his "office," and hold that they are records and give notice of conveyances entered therein.

For the purpose of throwing doubt on the accuracy of the entry in the entry book and of supporting the description as given in the record at large,

"The defendant offered evidence showing that the copy of the deed of May 6, 1860, from Lacey to Newman, as it existed on the record in the recorder's office was in the handwriting of a clerk in the recorder's office, and that the memorandum made in the records (a copy of which is referred to under heading 14 of this bill of exceptions) was in the handwriting of the recorder himself, and the defendant offered evidence tending to show that the clerk above men-

tioned was a careful, accurate copyist, and generally more correct in such work than the recorder himself." (Printed rec. p. 23.)

As far as such evidence related to the weight to be given the different items of evidence, it is immaterial now, as the finding of facts in the court below is conclusive and does away with any consideration of the question of preponderance of evidence. At a former term of this court, however, a motion was made to dismiss the writ of error on the ground that it did not involve the sum of $5,000. Joined with that motion was one to dismiss the writ, because it was sued out on frivolous grounds and for delay only. In suggestions opposing those motions, counsel for plaintiff in error stated that they wished to insist in this court that the recorder had no power to employ a clerk and that the copy of the deed on the record, having been done by a clerk, was no record at all. No such objection was made in the court below to the introduction of the certified copy of the Lacey-Newman deed, and we insist it cannot now be urged here for the first time.

We contend that a public officer, such as a recorder, can employ clerical force without statutory authorization. In saying this we do not contend that he can appoint a deputy who can certify to copies in his (the deputy's) own name, or perform all the other duties of the recorder in his own name. To legally appoint such a deputy it may be that statutory authority is requisite. But the employment of a copyist or clerk is different. He acts not as a deputy but as the recorder himself. He does nothing in his own name, but is simply an amanuensis. This was all that the copyist in this case did.

But even if the recorder in this case had appointed a regularly sworn deputy, any action of that recorder or

deputy could not be questioned here in this collateral manner. In the case of *Cook* v. *Hall*, 19 Ill., 575, a person other than the recorder, and acting either as the clerk or the deputy of the recorder, had received a deed offered for record and indorsed it as filed for record, signing the recorder's name. He was acting at the request of the recorder, but without any appointment in writing. It was objected that the recorder was not permitted by law to act by deputy. In speaking of how the parties would be affected by the recorder's acting by deputy, on page 580, the court say:

"No laches can be imputed to the grantees. They were not required to ascertain who was the recorder *de jure*. It was sufficient to ascertain who was in possession of the records and discharging the duties of his office. Whether the law allows a recorder to perform his duties by deputy is a question which does not properly arise here. If there is any doubt about the matter it would be properly determined in a prosecution against him for failing to perform in person the duties of the office. Under the circumstances of this case we are inclined to the opinion that the acts of Hague may be held valid between these parties as the acts of an officer *de facto*."

But even if the objection of plaintiff in error, that the recorder could not act by deputy, should for a moment be supposed good, the only effect thereof would be to throw out of the case the record *in extenso* of the Lacey-Newman deed, and leave the entry book and all the evidence corroborative of it, which would still abundantly prove the deed.

All the evidence being competent, the finding of the court below thereon, that the Lacey-Newman deed conveyed the *North-East* quarter cannot be inquired into here.

On pages 12 and 13 of the printed record the court will find a regular chain of title down to Tiernan, defendant in

error. The title passed back from Murphy to the Tiernans both by mortgage and deed. Murphy and wife mortgaged the land to Seth C. Tiernan and Morris Jones, executors of the estate of the father of the defendant in error. In Illinois a mortgage conveys the title, and ejectment can be sustained thereon at any time after breach of condition. *Fisher* v. *Milmine*, 94 Ill., 328. "In connection with this "mortgage evidence was offered showing that the debt se- "cured by the mortgage had never been paid, and that the "equity of redemption and the possession of the land had "been surrendered to the mortgagee in satisfaction of the "mortgage." (Printed rec. p. 12.) To remove all question, however, the heirs of Murphy quit-claimed the land to defendant in error (printed rec. p. 12), as also did the sole surviving executor to whom the mortgage was made. (Printed rec. p. 13.)

Counsel for Mr. Booth objected to the introduction of each of these deeds, on the ground that there was no title in the respective grantors. That is, they objected to the introduction of the deeds because no title had passed out of Lacey into Newman and the Tiernans. The court below, however, held that the Lacey-Newman deed did convey the North-East quarter, and if it did, their objections of course fall.

The eighth assignment of error is founded on the admission in evidence of the memorandum indorsed on the back of the Chicago land office receipt. In the bill of exceptions, at the top of page 21 of the printed transcript, the court expressly certifies that the indorsement on that land office receipt was *not* admitted as competent evidence, nor was the memorandum at the foot of the Lacey-Newman deed.

Up to this point we have considered the first ten assignments of error, and there is only one left proper to be considered—the eleventh.

DEFENSE OF THE STATUTE OF LIMITATIONS.

The defendant, Booth, set up as a defense in the court below the seven years' statute of limitation, barring a right of action against one who has actually resided on land for seven years under color of title. The clause of the statute is as follows:

"Actions brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record, from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such land for the non-payment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution, or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken, as aforesaid; but when the possessor shall acquire such title after taking such possession, the limitation shall begin to run from the time of acquiring title."

Under this statute the defendant, Booth, claimed that he had possessed by actual residence the North-east quarter of section 29 from December 7, 1868, to December 7, 1875, the date of the commencement of this action.

There is hardly sufficient evidence to give color to this defense. *Possession* of a tract is not sufficient to call this section of the statute of limitations into force. We have a section regarding possession, and it requires payment of taxes and good faith in the acquirement of title. This section however dispenses with payment of taxes and good faith, but requires *actual residence.* Actual residence therefore is something much more than mere possession. Possession will not satisfy the requirements of this section. But the defendant, Booth, did not even have possession of this tract of land.

The Supreme Court of Illinois has again and again construed what possession means under the limitation law. In each case they have declared that it must be *exclusive*. Exclusiveness is the primary test. It must also be open, hostile and so notorious as to apprise every person that the occupant claims adverse, hostile possession.

"But to be adverse, it must be a *pedis possessio*, or an actual possession. And to constitute such a possession there must be such an appropriation of the land to the individual as will apprise the community in its vicinity that the land is in the *exclusive* use and enjoyment of such person. Trifling acts, doubtful and equivocal in their character, and which do not clearly indicate the intention with which they are performed, cannot be regarded as amounting to possession."

Morrison v. *Kelly*, 22 Ill., 623.

In speaking of the possession necessary under the statute requiring possession only, the court say in *Weaver* v. *Wilson*, 48 Ill., 128: "Possession, in all such cases, should be "so *open*, *adverse*, *notorious and exclusive*, as to give the "real owners notice."

"It is true that he cut timber, dug a well, and exercised some acts of ownership upon the land the fall previous, but those acts did not constitute that actual possession contemplated by the statute. * * * The legislature undoubtedly meant what they have said, that the possession must be actual; that is visible, open and exclusive, either by an inclosure, the erection of buildings, or in some other way, actually appropriating and using the land, in such an open, visible manner, as to give the real owner notice that the person in possession was occupying and claiming the land as his own."

Irving v. *Brownell*, 11 Ill., 413.

"While the legal title or fee draws to it the legal possession, it is different as to a *pedis possessio*. In the latter case it must be open, exclusive and public, or it will not be sufficient." "The merely passing over real estate or going

upon it for a temporary purpose, is not a *pedis possessio*. *McCartney* v. *McMullin*, 38 Ill., 237."

Hassett v. *Johnson*, 48 Ill., 73.

To the same effect are *Kerr* v. *Hitt*, 75 Ill., 61, and *Jackson* v. *Berner*, 48 Ill., 203.

Actual residence means much more than this. It is an equivalent for payment of taxes and good faith in the acquirement of the title. Therefore the statute ought to be very strictly complied with.

"The doctrine is well recognized and established that a man may have the actual possession of real estate without a residence on it."

Morrison v. *Kelly*, 23 Ill., 623.

"But while the proof shows more than seven years' possession under a title deducible of record, from a person authorized to sell by the order of a court, it fails to show that such possession was *by actual residence*. It does not appear whether appellant *resided* on the land he bought from Schenerman or not."

Stumpf v. *Osterhage*, 94 Ill., 117.

A strong case, showing what actual residence is, and that it is more than possession, and that it requires that the premises be used as subservient to the residence is *Davis* v. *Young*, 2 Dana, 302.

What evidence did Mr. Booth offer in support of this claim of actual residence? All the evidence on the subject is found on pages 24 and 25 of the printed record. Booth himself resided in the city of Morris, twelve miles distant, till 1873. Then he moved upon the north-west quarter of this section. The residence claimed is by tenant, one Stevens, who worked a part of the adjoining section (sec. 30) on shares. No part of the section (sec. 29) in which the quarter in controversy lies was included in the lease to

Stevens. By reference to the map on page 24 of the printed record, it will be seen how the sections lie, and what fences are about them. The two sections, 29 and 30, were separated by a traveled public road, fenced on both sides, and Stevens had nothing whatever to do with section 29. There was a running creek on section 29, and Stevens, *as well as other neighbors*, drove his cattle to water there during the winter of 1868–9. In passing from section 30 to 29 in doing so, it was necessary for him to take down two fences and cross a public road. All the other neighbors had easier access to this section than he had. The greater part of the north line of the north-east quarter of section 29 was open, and to the north of it stretched an unbroken, unfenced prairie, a common grazing place for all cattle the neighboring farmers chose to put upon it. In relation to this, on page 25 of the printed record, it is said: "On the east line "of the N. E. ¼ of section 29 it was open, except as herein- "after stated, and on the north line of the N. E. ¼ of said "section, there was, as has been stated, an open space, over "both of which open spaces on the north line and the east "line of N. E. ¼ sec. 29, *cattle could come and* go at all "times from the prairie immediately adjoining." What possible *exclusiveness* was there about such a use of land? The other neighbors had much better access to it, and the prairie to the north on which cattle were always grazing was in direct communication with it. Very plainly there was not even possession by Booth of this tract, and not the slightest approach to actual residence. Stevens drove his cattle on section 29 for the purpose of watering them. The plat shows that the creek runs through the north-west quarter also. It may be, therefore, that Stevens watered his cattle on the north-west quarter, and never approached the north-east quarter. The southern part of section 29 was

inclosed by a fence. The fence started at the middle of the west line of the section and ran east to the middle of the section, thence south a short distance, thence south-east to the east line of the section. This plainly shows, not only a fencing in of the southern part of the section, but *a fencing out of the northern part*, leaving it a part of the open prairie. The only fence touching the north-east quarter was a few panels at the north-east corner.

It does not appear that there were any gates in the two fences between sections 29 and 30, or that Booth was in the stock business, or that he had many cattle, or that this land was used for pasturage, or that any attempt was made to fence in the public highway.

The bill of exceptions states that "in the spring of 1869, "the land in controversy was inclosed with a fence and used "by the defendant as a pasture." This plainly shows the first act of ownership exercised over it by Booth. In a loose, general way Stevens testified that he was to look after it in the winter of 1868–9, but he received no compensation for so doing and derived no profit therefrom.

Can it be for an instant contended that there was any *pedis possessio* here, much less residence? Was there any "open," "notorious," "*exclusive*," or "public" possession here? Do not the words of the court in *Hassett* v. *Johnson*, 48 Ill., 73, apply as if written for these facts? "The merely "passing over real estate, or going upon it for a temporary "purpose, is not a *pedis possessio*."

But there is another fatal objection to this claim of actual residence. The residence must be continuous. There is not the slightest evidence to show any residence of any one from 1868 to 1873. On the contrary, the evidence expressly negatives such an idea. "In the spring of 1869, "the land in controversy was inclosed with a fence, and

"*used by defendant* as a pasture." He did not possess it or reside on it by a tenant, but he himself *used* it as a pasture. Who was residing on it? Not Booth; he was in Morris, twelve miles away, and did not move near the place till 1873. Not Stevens; because Booth was using it. Moreover, Stevens expressly limits his very slight connection with the property to the fall and winter of 1868. It therefore very plainly appears affirmatively that no one resided on this land during 1869 to 1873. This defense of residence therefore wholly fails for that period, and no other defense is interposed.

We insist that there is not the slightest color of a case of actual residence or even of possession made out by Booth. It would probably never have been dreamed of if he had any other semblance of a defense to this action. It sprung only from the inherent weakness of his real defense, which was his hope that the Lacey-Newman deed could not be affirmatively proven. This is a speculative attempt to seize upon a seeming flaw in the title by which the Tiernan family had held this land and paid all the taxes thereon for nearly thirty years.

We submit also that the court below, in finding for the plaintiff, Tiernan, must have found as a fact, that the defendant, Booth, was not possessed by actual residence of this quarter section from December 7, 1868, to December 7, 1875, and that finding of a fact cannot be reviewed in this court. Counsel for plaintiff in error seem to concede this by the eleventh assignment of error.

Respectfully submitted,

WM BURRY,

Att'y for Defendant in Error.

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109-205

OFFICE SUPREME COURT U.S.
FILED
MAR 20 1882
JAMES H. McKENNEY, CLERK

UNITED STATES SUPREME COURT,

OCTOBER TERM, A. D. 1881,

EDWARD R. BOOTH,
Plaintiff in Error,
vs.
JOHN M. TIERNAN,
Defendant in Error.
} Error to Circuit Court of the United States for the Northern District of Ills.

Argument on Motions to Dismiss, &c.

WILLIAM BURRY,
Att'y for Defendant in Error.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH ST.
1882.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1881,

EDWARD R. BOOTH, *Plaintiff in Error.*	Writ of error
vs.	to U. S. Circuit Court,
J. M. TIERNAN, *Defendant in Error.*	Northern District of Ills.

And now comes said defendant in error, by William Burry, his attorney, and moves the court to dismiss the writ of error herein, for the reason that the value of the property in controversy in this cause is less than the sum of five thousand dollars.

And if the above motion is denied by this court, then the said defendant in error, by his said attorney, moves the court that the judgment of the Circuit court in this cause be affirmed, for the reason that it is manifest from the record that the writ of error in this cause was taken for delay only.

And if both of the above motions are denied by this court, then the said defendant in error, by his said attorney, moves the court that the supersedeas allowed in this cause by the Circuit court be set aside, and said Circuit court be directed to order a writ of restitution to issue in accordance with the judgment in this cause, for the reason that no citation was issued or served upon defendant in error herein for more than six months after the writ of error in this cause was sued out.

WM. BURRY,
Attorney for Defendant in Error.

ARGUMENT.

MAY IT PLEASE THE COURT:

This is an ejectment case in which judgment was rendered in the court below for the plaintiff, Tiernan, now defendant in error. Defendant in error now presents to the court three motions. The first of these is that the case be dismissed because the amount in controversy does not reach $5,000.

This case was tried three times in the court below. On a trial in November, 1878, Mr. Booth, then defendant, attempted to show possession, &c., under color of title *acquired in good faith*. On the question of good faith there necessarily came up the price Mr. Booth paid for the land in controversy, and what it was worth at the time of trial.

On the last trial in June, 1879, that defense was not set up, and therefore no evidence was given on the question of value. A stenographer took down all the evidence of the value of the land, given on the trial in November, 1878, and it has been reduced to writing, sworn to by the stenographer as a correct transcript of the evidence given on that trial in regard to the value of the property. The affidavit is filed in this cause and has been printed and is attached to this brief as "Exhibit A," and on it we rely in support of our first motion.

It is the evidence of the defendant and three of his witnesses on what was, at the time the evidence was given, a very material point in the case. Mr. Booth stated very

positively that he paid fair value for the rest of his land, and also for the quarter section in controversy—the North-east quarter. He paid about $20 per acre for the balance, and about $5.50 per acre for this. That the balance of the section was the ordinary rich loam soil of Illinois, and at the time of trial was worth about $40 per acre. That the North-east quarter in controversy was nothing but a piece of sand waste, a deep slough taking up a large part of it, and that the balance of it was either a swamp or covered with scrub oak. That it was not worth per acre more than a third of the worth of the balance of the section. That it was worth hardly anything as a separate farm, certainly not more than $15 per acre, but used as a pasture in connection with the balance of the lot it might be worth to him possibly $20 per acre.

Every one familiar with the farming lands of Illinois will at once see that this is a very fair statement of such lands. The ordinary price for good, well-cultivated farming land is $40. But here and there, throughout all the State, run sloughs, moving slowly, and being little more than swamps. Often the land for a considerable way back from them is sandy or covered with a low scrubby undergrowth of trees. The land can only be used as an occsional pasture, and to water stock. The testimony in the affidavit gives an admirable description of the good and bad parts of Illinois farms.

The statements in exhibit A were made under oath, under cross-examination by counsel whose interest it was to have a higher valuation appear, and on a very material point in the case. Much more weight ought therefore to be given it than to a mere affidavit.

The expressions are strong and positive. Booth himself says: "The other is strong muck land, and the

"northeast quarter is mostly sand knolls and sloughs." "Well, in connection with the balance of my farm, I con- "sider it worth $20 an acre. I don't consider it worth "that much to make a farm of by itself, because there is "no farming land there to speak of." S. G. Stevens says: "It was a sandy barren; a good deal of sand "knolls, and a big slough running through it." "There "was just sand blowing there. There didn't seem to "be no soil there, but just dry sand." "It was worth "five or six dollars an acre." Redding thought that at the time of the trial it was worth $9 per acre. The highest price set, that by Booth, $15 per acre, would be $2,400 for the land in controversy.

The testimony is all to the point, none of it will bear omitting, and we can only ask the court to read it all in this connection.

Then the plaintiff in error ought to be estopped from denying this valuation so sworn to by him. His testimony, and that of his witnesses, bears the marks of truth. It corresponds with the description and prices of Illinois farming land. But, if his testimony was not true, if he was attempting to deceive the court, he ought certainly to be estopped from setting up that attempt at deception.

Taking, then, the price of this land as fixed by himself and his witnesses, has any change come over it? Any map of Illinois will show that it is, and has been for years before that testimony was given, within three or four miles of a station on the Chicago & Alton Railroad, near enough for all farming purposes. We understand that within a year, but long after the writ of error was sued out, another railroad has been built closer to it, but there is no station nearer.

The above testimony was given in November, 1878. The next trial was in June, 1879, with judgment and writ of error thereon, in December, 1879. In the ordinary course of the rise in farming lands, no increase of value within that year can have carried the value of this land from $2,400 or much less, to $5,000. Moreover, the other part of the section is worth three times as much as this, and would have to be worth about $100 per acre before the value of this quarter-section would rise to $5,000.

We understand the value of this land for the purposes of appeal must have been $5,000 at the time the writ of error was sued out.

It is popularly believed by all inhabitants of Illinois, especially by those who are proud of their State, that vast and rich coal fields, capable of being worked at a very great profit, underlie about two thirds of the State of Illinois. There are many men who believe that each acre of what is now farming land in more than two-thirds of Illinois, is worth from $100 to $200 per acre. There is no doubt but that plaintiff in error can now find many men, coal monomaniacs, who will come forward and swear, on a coal basis, that this land, at the time Booth and his witnesses swore, under cross-examination, that it was only worth $9 to $15 per acre, was and has been ever since worth $200 per acre. Any such affidavits, we submit, are incompetent as well as visionary, and the plaintiff in error ought not to be allowed to produce such affidavits to contradict his own testimony.

At the last trial of this case, in 1879, Mr. Justice HARLAN and Judge DRUMMOND sat together to hear the case. The case is an ordinary common law case, and ordinarily

would not have received such consideration, especially if an appeal was to be taken. The reason for the two judges sitting together does not appear in the record, but perhaps Mr. Justice HARLAN may remember it. They sat together on the representation of Mr. Booth's attorneys that the cause was so small that it did not admit of an appeal, and that the decision below must be final.

II.

In case the motion to dismiss for want of jurisdiction be not allowed, then defendant in error moves the court that the judgment in this cause be affirmed, for the reason that it is manifest, from the record, that such writ of error was taken for delay only.

This was an action in ejectment brought by Tiernan against Booth, to recover the North-east quarter of section 29, &c. There was a common source of title, Ibzan Lacey, who held the land in 1839. (Record, p. 10.) From that common source the plaintiff, Tiernan, had a clear title of record, with the single exception of the deed from Lacey. The record showed a deed from Lacey to Alva Newman, the next person in the Tiernan chain of title, but the description in it was that of the *South*-east quarter of section 29. The rest of the Tiernan title was all clear and straight, and the only question was as to the Lacey-Newman deed, whether it conveyed the North-east or South-east quarter. This deed was dated the sixth day of May, and recorded the 14th day of May, A. D. 1840. The title of the defendant, Booth, was made in this way. In 1868, the sole surviving heir of Ibzan Lacey was given $200 for a quit-claim deed to this quarter section, on the assumption,

of course, that the Lacey-Newman deed did not convey the North-east quarter. It was stipulated that the original Lacey-Newman deed was lost. (Printed record, page 10.)

The contention of the plaintiff, Tiernan, was that the description of the land in the Lacey-Newman deed was the North-east quarter, and that the recorder made a mistake in recording it, and made it read "South-east" quarter. The position taken by Booth, defendant, was that the plaintiff was bound by the record, and could not be permitted to show that the recorder made a mistake.

In order to prove the Lacey-Newman deed, and that it conveyed the North-east quarter, plaintiff offered, first, a certified copy of the deed, shown on page 10 of the printed record; second, a certified copy of the page of the entry book from the recorder's office where the deed was recorded. The recorder was required by law to keep this entry book, just as much as the record book for the recording of the deed at length. In this extract from the entry book, which appears on page 14 of the printed transcript, appears the entry of the Lacey-Newman deed, and the description of the property is the "N. E. $\frac{1}{4}$," &c.

At the foot of the Lacey-Newman deed (page 11) appears a memorandum as follows: "This land was entered by Jeddiah Wooley, August 8th, 1835." The plaintiff next offered a transcript from the land office at Springfield, Illinois, showing that Jeddiah Wooley entered the N. E. $\frac{1}{4}$ on August 8, 1835, and that he never entered the S. E. $\frac{1}{4}$ (item 15 on page 15). The plaintiff next offered in evidence a receipt from the Chicago land office, dated August 8, 1835, showing that Wooley entered the N. E. $\frac{1}{4}$ of section 29 on that day. Endorsed

on that receipt, in the handwriting of Wicks, the attorney in fact of Lacey, was: "Sold this to Alva Newman May 6th, 1840." (Item 16, on page 15.) The plaintiff also offered the deposition of Gurdon Secor, the justice of the peace who drew the deed in the Tiernan chain of title next succeeding the Lacey-Newman deed. He testified that he remembered distinctly drawing a deed from Newman to Tiernan in 1842, and that he copied the description from the Lacey-Newman deed. (Printed record, pp. 15, 16 and 17.) The Newman-Tiernan deed was shown to convey the north-east quarter. Plaintiff also offered the deposition of Daniel Rorke, son-in-law of Newman (pp. 18 and 19). Rorke testified to the comparing, &c., of the two deeds, and that Newman never owned but the one piece of land in Illinois. In admitting the Lacey-Newman deed the court did not decide that the words at the bottom of it, "This land was entered by Jeddiah Wooley, August 8, 1835," was competent evidence; and, in admitting the land office receipt, did not decide the words endorsed on it, "Sold to Alva Newman, May 6, 1840," was competent evidence. (Printed record, p. 21.)

The defendant Booth offered some evidence in the way of the general accuracy of the recorder, &c., and also some deeds, for the purpose of breaking the force of the evidence offered by plaintiff to show that the Lacey-Newman deed read "North-east quarter." As to the weight of the evidence, both plaintiff's and defendant's, on the true reading of the Lacey-Newman deed, we understand this court has nothing to do. The facts of the case were found finally by the court below, and the only question here is whether any improper testimony was admitted. Any discussion on the relative weight of testimony, or on

the defendant's testimony on this point at all, *either as to competency or weight*, is superfluous.

The only question to be considered then in regard to plaintiff's case is: Did the the court below err in permitting us to prove that the recorder made a mistake in recording the deed? We say that it is so plain that we were entitled to do so, and our right to do so is so well settled by the decisions of the courts that an appeal taken on such grounds must have been plainly taken for delay.

The entry book, a page of which was offered in evidence, was required by statute to be kept just as much as the record book, and the two records, the entry book and the record, were of the same degree of evidence. If we were bound by one, they were equally bound by the other.

As early as A. D. 1795, the statute required the recorder to keep such a book and substantially the same provision is still in force in this State to-day. The section of the statute regarding entry books in force when this deed was recorded, being section seven of the act of January 8th, 1829, was as follows:

"Every recorder shall keep a fair book, in which he shall immediately make entry of every deed or writing brought into his office to be recorded, mentioning therein the date, the parties, and the place where the lands, tenements or hereditaments granted or conveyed by the said deed or writing are situate, dating the entry on the day on which such deed or writing was brought into his office, and shall record all such deeds and writings in regular succession, according to the priority of time of their being brought into said office, and shall also make and keep a complete alphabetical index to each record book, showing the page on which each instrument is recorded, with the names of the parties thereto; he shall give a receipt to the per-

son bringing such deed or writing to be recorded, bearing date on the same day as the entry and containing the abstract as aforesaid, for which entry and receipt he shall be entitled to no fee or compensation whatever."

There are two ways of considering the competency of this evidence proving the deed which it was stipulated was lost. 1st, as secondary evidence at common law, introduced to prove the contents of a lost deed. 2d, as the introduction of a certified copy under the statute making such copies evidence, with evidence to show a mistake by the recorder. Considered in either way it was clearly competent.

1. The certified copy of the deed was at common law the most satisfactory kind of secondary evidence. *Stetson* v. *Gulliver*, 2 Cush., 498; *Winn* v. *Patterson*, 9 P., 670; *Wells* v. *Iron Co.*, 48 N. H., 534.

"In this State it has been held if a deed has been recorded a transcript may be introduced, the party offering it making oath that the original was not in his custody and was beyond his control, and this *independent of any statute.*" "The transcript is regarded as the highest and most satisfactory degree of secondary evidence." *Bowman* v. *Wettig*, 39 Ill., 422.

The copy from the entry book which the recorder was by statute required to keep, was, by common law, competent to prove its contents. *Lane* v. *Bommelman*, 17 Ill., 96; *U. S.* v. *Percheman*, 7 P., 85.

The principles of law determining the competency of the other evidence, as secondary evidence at common law, are too well settled to need even mention; therefore, the evidence being competent, the finding must stand as conclusive.

2. A certified copy of a deed may be introduced un-

der the statute, accompanied with evidence to show a mistake by the recorder.

A mistake of the recorder cannot prejudice our title.

Nottinger v. *Ware*, 41 Ill., 245.

Polk v. *Cosgrove*, 4 Biss., 437.

It may be shown that the recorder made a mistake, and his mistake is not conclusive on us when we use the record as evidence.

In the case of *Nixon* v. *Cobleigh*, 52 Ill., 387, the court consider evidence offered to show that the recorder made a mistake, and say, on page 390: "This renders it mor-"ally certain that the recorder made a mistake in tran-"scribing the original upon his records." The court then treats the deed as it ought to be in their decision of the case. This case seems to us conclusive on this point.

A case even stronger than that one, and giving fully the reasons why a mistake may be shown, is *Harvey* v. *Thorp*, 28 Ala., 250. To the same effect are *Sexsmith* v. *Jones*, 13 Wis., 565; *Wells* v. *Iron Co.*, 48 N. H., 495, 503, 534; *Congl. Church* v. *Morris*, 8 Ala., 182.

The entry book being a record, and differing from what purported to be another record of the same deed, it was a question of fact upon all the evidence what this original deed was, which record was correct.

Wells v. *Iron Co.*, 48 N. H., 534 (12).

The evidence being competent, the finding of the court below cannot be inquired into here.

On pages 12 and 13 of the printed transcript the court will find a regular chain of title down to Tiernan, defendant in error. The title passed back from Murphy to the

Tiernans, both by mortgage and deed. A mortgage will sustain ejectment in Illinois. Counsel for Mr. Booth objected to the introduction of each of these deeds, on the ground that there was no title in the respective grantors. That is, they objected to the introduction of these deeds because no title had passed out of Lacey into Newman and the Tiernans. The court below, however, held that the Lacey-Newman deed did convey the North-East quarter; and their objections, therefore, fall.

The eighth assignment of error is founded on the admission in evidence of the memorandum endorsed on the back of the Chicago land office receipt. In the bill of exceptions, at the top of page 21 of the printed transcript, the court expressly certifies that the endorsement on that land office receipt was *not* admitted as competent evidence.

Up to this point we have considered the first ten assignments of error, and there is only one proper one left to be considered—the eleventh.

The defendant, Booth, set up as a defense in the court below the seven years' statute of limitation. On the trial of this cause in 1878, he set up the provision requiring seven years' payment of taxes and possession under color of title acquired in good faith. On the last trial, in 1879, he set up the clause of our statute of limitations barring a right of action against one who has actually resided on land for seven years under color of title. The clause of the statute is as follows:

"Actions brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record, from this State or

the United States, or from any public officer or other person authorized by the laws of this State to sell such land for the non-payment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution, or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken, as aforesaid; but when the possessor shall acquire such title after taking such possession, the limitation shall begin to run from the time of acquiring title."

Under this statute the defendant Booth claimed that he had possessed by actual residence the north-east quarter of section 29 from December 7, 1868, to December 7, 1875, the date of the commencement of the action.

There is hardly sufficient evidence to give color to this defense. *Possession* of a tract of land is not sufficient to call this section of the statute of limitations into force. We have a section regarding possession, and it requires payment of taxes. This section however dispenses with payment of taxes, but requires *actual residence.* Actual residence therefore is something more than mere possession. Possession will not satisfy the requirements of this section. But the defendant, Booth, did not even have possession of this tract of land.

The Supreme court of Illinois has again and again construed what possession means under the limitation law. In each case they have declared that it must be *exclusive.* Exclusiveness is the primary test. It must also be open and so notorious as to apprise every person near, who is in possession. *Kerr* v. *Hitt*, 75 Ill., 61; *Hubbard* v. *Kiddo*, 87 Ill., 578; *Jackson* v. *Berner*, 48 Ill., 203; *Weaver* v. *Wilson*, 48 Ill., 128; *Morrison* v. *Kelly*, 22 Ill., 623.

Actual residence means even more than this.

"But while the proof shows more than seven years' possession under a title deducible of record, from a person authorized to sell by the order of a court, it fails to show that such possession was by actual residence. It does not appear whether appellant *resided* on the land he bought from Schenerman or not."

Stumpf v. *Osterhage*, 94 Ill., 117.

What evidence did Mr. Booth offer in support of this claim of actual residence? All the evidence on the subject is found on pages 24 and 25 of the printed transcript. Booth himself resided in the city of Morris, 12 miles distant, till 1873. Then he moved upon the north-west quarter of this section. The residence claimed is by tenant, one Stevens, who worked a part of the adjoining section, (Sec. 30), on shares. No part of this section (Sec. 29), in which the quarter in controversy lies, was included in the lease to Stevens. By reference to the map on page 24 of the printed transcript it will be seen how the sections lie, and what fences are about them. The two sections, 29 and 30, were separated by a traveled public road, fenced on both sides, and Stevens had nothing whatever to do with section 29. There was a running creek on section 29, and Stevens, *as well as other neighbors*, drove his cattle to water there during the winter of 1868–9. In passing from section 30 to 29 in doing so, it was necessary for him to take down two fences and cross a public road. All the other neighbors had easier access to this section than he had. The greater part of the north line of the north-east quarter of section 29 was open, and to the north of it stretched an unbroken, unfenced prairie, on which cattle grazed. In relation to this, on page 25 of the printed transcript, it is said: "On the east line of the N. E. $\frac{1}{4}$ of "section 29 it was open, except as hereinafter stated, and "on the north line of the N. E. $\frac{1}{4}$ of said section, there was

"as has been stated, an open space, over both of which "open spaces on the north line and the east line of N. E. "¼ Sec. 29, *cattle could come and* go at all times from the "prairie immediately adjoining." What possible *exclusiveness* was there about such a use of land? The other neighbors had much better access to it, and the prairie to the north on which cattle were always grazing was in direct communication with it. Very plainly there was not even possession by Booth of this tract, and not the slightest approach to actual residence. The bill of exceptions states that "in the spring of 1869, the land in controversy "was enclosed with a fence and used by the defendant as "a pasture." This plainly shows the first act of ownership exercised over it by Booth. In a loose, general way Stevens testifies that he was to look after it in the winter of 1868–9, but he received no compensation for so doing and derived no profit therefrom.

But there is another fatal objection to this claim of actual residence. The residence must be continuous. There is not the slightest evidence to show any residence of any one from 1868 to 1873. On the contrary, the evidence expressly negatives such an idea. "In the spring of 1869, "the land in controversy was enclosed with a fence, and "*used by defendant* as a pasture." He did not possess it or reside on it by a tenant, but he himself *used* it as a pasture. Who was residing on it? Not Booth; he was in Morris, twelve miles away, and did not move near the place till 1873. Not Stevens; because Booth was using it.

We insist that there is not the slightest color of a case of actual residence or even of possession made out by the defendant Booth, and that his defense of the statute of

limitations is wholly without facts to sustain it, and error thereon is only assigned for delay.

We submit also that the court below, in finding for the plaintiff, Tiernan, must have found as a fact, that the defendant, Booth, was not possessed by actual residence of this quarter section from December 7, 1868, to December 7, 1875, and that finding of a fact cannot be reviewed in this court.

III.

If neither of the two foregoing motions are allowed, then defendant in error moves the court to set aside the supersedeas granted in this cause, and to direct the court below to order a writ of restitution to issue, to put the defendant in error in possession of the premises in controversy.

The judgment in the court below in this cause was entered in December, 1879. A writ of error to the October term, A. D. 1880, was sued out on that judgment, and a proper bond filed and approved in connection therewith, within ten days after the entry of the judgment; but no citation on the writ of error was issued or served till September, A. D. 1880.

Counsel for the plaintiff below moved the court for a writ of restitution, but the court denied the motion and filed in the cause a written opinion, giving its reasons for refusing the motion. A copy, certified from the court below, of that motion, order and opinion, has been filed in this court. It is probably not properly a part of the record here, unless this court orders it to be so on a suggestion of a diminution of the record. The clerk has not

printed it as part of the transcript of record, but it is printed as Exhibit B, to this brief. The opinion of the court below is also published in the Chicago Legal News, vol. 13, p. 94. Whether or not we have adopted the proper mode to bring this question before this court, and whether we ought to proceed by mandamus against the court below, asking that it be directed to order a writ of restitution, can make no difference here; for the court below, in closing its opinion, expressly says that no order on it will be necessary, and that on any intimation by this court, that the writ ought to issue, the writ will be at once ordered.

We insist, then, that the provisions of section 1007 of the U. S. Statutes in regard to perfecting a supersedeas on a writ of error, have not been complied with, in this, that a citation was not issued or served within the sixty days after the entry of the judgment allowed by that statute for such issuance and service.

A supersedeas is a statutory remedy, and the statute must be strictly complied with. *Sage* v. *R. R. Co.*, 93 U. S., 417; *Kitchen* v. *Randolph*, 93 U. S., 86, *et passim.* Not even an amendment will be allowed. *City of Washington* v. *Dennison*, 6 Wall., 496.

A citation is a necessary pre-requisite to a supersedeas and must be issued at or before the time the bond for security is given, or at least within the 60 days. *Sage* v. *R. R. Co.*, 96 U. S., 714, also p. 738; *Stockton* v. *Bishop*, 2 How., 74; *Kitchen* v. *Randolph*, 93 U. S., 90; *Rubber Co.* v. *Goodyear*, 6 Wall., 156; *Silver* v. *Ladd*, 6 Wall., 440; *Sage* v. *R. R. Co.*, 93 U. S., 416–7.

A citation is just as necessary to a writ of error as the writ itself. It is just as important to get the parties into

court as the subject matter. "The writ brought up the "record, and the citation the parties." *Kitchen* v. *Randolph*, 93 U. S., 87.

Had the writ of error not been lodged with the clerk for the defendant in error, would it be contended that a supersedeas had been perfected? yet the citation is just as necessary as the writ.

Until a judge has signed the citation, there is no judge qualified to approve a bond. Any other judge or justice, or the clerk will not do. *Silver* v. *Ladd*, 6 Wall., 440; *Rubber Co.* v. *Goodyear*, 6 Wall., 156; *Palmer* v. *Downer*, 7 Wall., 541; *U. S.* v. *Hodge*, 3 How., 534.

In this case the bond and writ were signed by a judge in December, 1879, the citation in September, 1880, within a month of the latest day on which it could issue, to prevent a dismissal of the writ of error. Had the judge who approved the bond not been on the bench when the citation was presented for signature, or had he been abroad, so that the signature could not have been obtained for a month longer, it could not have been contended then that a writ of error had ever been taken to this court and perfected, and still less that a supersedeas could have been in force.

To obtain a supersedeas, a party should prepare himself with a good bond, a writ of error and a citation, and thus armed, apply to the proper judge to have him approve the bond, allow the writ of error and sign the citation. Conkling's Treatise, p. 671.

Judge CURTIS, in his appendix to his digest, expressly says, (p. 596), that the citation must be signed *within the ten* (now sixty) days, in order to create a supersedeas.

This court has dismissed several cases on the ground that *without a citation* it *has no jurisdiction;* and have also said that an appeal must be *perfected* before a supersedeas can exist. *Alviso* v. *U. S.*, 5 Wall., 824; *Bacon* v. *Hart*, 1 Black, 38; *Kitchen* v. *Randolph*, 93 U. S., 86; *Sage* v. *R. R. Co.*, 96 U. S., 715, also p. 738.

This court has therefore, dismissed several cases on the express ground that it had *no jurisdiction* unless the citation was issued and served, i. e., the case *is not removed into this court* until the citation issues and is served. There is no writ of error *perfected* without a citation. Where, then, is the case? Plainly, in the court below. In this case the defendant had a narrow escape from having his writ of error wholly dismissed for want of a citation. The time for issuing a citation at all would have expired within a month from the time when it was actually issued. Suppose, for instance, he had delayed for a month longer, then there would have been no case in this court, *no jurisdiction*, the case would not have left the court below, there would have been no writ of error. Could it, in that case, have been contended that, although there was no writ of error, no appeal nor any sort of an application to this court to reverse this case, there was a supersedeas during all the time till the writ of error was dismissed *for want of jurisdiction?* The court says that a supersedeas springs out of and depends upon a *perfected* appeal or writ of error, but there was no *perfected* writ of error in this case in existence until September, A. D. 1880. Yet a supersedeas can only be perfected within sixty days from entry of judgment, not after. Shall we then have a supersedeas with nothing from which it can spring, with nothing on which it can depend, with no

source from which it can come? Shall we have an incident without the principal matter on which it depends?

Both a writ of error or citation can issue at any time within two years from entry of judgment, but a supersedeas must be perfected within sixty days, or never.

The court below, all through its opinion, speaks of its power to grant a supersedeas; it speaks of having treated the bond as a supersedeas; that it may endorse a bond as a supersedeas bond; and that inasmuch as the plaintiff was served with a citation, it will withhold a writ until this court passes on the case.

With this position of the court we take issue. A judge of the Circuit court, or a justice of the Supreme court, acting as circuit judge, *has no power, jurisdiction or discretion to grant or withhold a supersedeas.* He may indirectly do so, by refusing peremptorily to *sign a citation*, or to *approve a good bond.* If satisfied that a case was not appealable, it might be his duty to do so. But the *effect* of his allowing a writ of error, signing a citation, and approving a bond, is a matter of statute. If these three things are done within the sixty days allowed by statute, he cannot prevent their operating as a supersedeas, even if he should expressly add to his approval of the bond that it was not to act as a supersedeas. So, also, adding to his approval of the bond, or announcing in court that it was to operate as a supersedeas, would be surplusage, and have no effect unless the other requisites for a supersedeas were complied with.

"A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. * * * * Time is an essential element in the proceeding, and one which neither the court nor

the judges can disregard. *If a delay beyond the limited time occurs,* the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he cannot be deprived without due process of law." *Sage* v. *R. R. Co.*, 93 U. S., 417.

"We are, therefore, of the opinion, that under the law, as it now stands, the service of a writ of error, or the *perfection* of an appeal *within sixty days,* Sundays exclusive, after the rendering of the judgment, or the passing of the decree complained of, is an *indispensable prerequisite* to a supersedeas, and that *it is not within the power* of a justice or judge of the Appellate court to grant a stay of process on the judgment or decree, if this has not been done." *Kitchen* v. *Randolph*, 93 U. S., on page 92.

If the circuit judge approves a bond on a writ of error, either adding that it is to operate as a supersedeas, or not, and no writ of error is lodged for defendant in error within the sixty days, can it be contended that a supersedeas would exist, or if also the citation were signed and served, but no writ issued, would there be a supersedeas? We contend that the three things are necessary to perfect a writ of error, and so raise a supersedeas.

We have a valid judgment now on the records of the court below. We wish execution on it. The statute has prescribed certain conditions on complying with which only defendant can stay process, leaving, according to the two decisions last quoted, no discretion in the court below to stay its process on the ground of a supersedeas, if those conditions are not complied with. Those conditions, according to our opinion, have not been complied with.

If the court is of opinion that they have not complied with all of those conditions precedent, a writ of restitution

should be awarded. If they cannot show a perfected supersedeas, then "the successful party holds his judg- "ment or decree freed and discharged from this means of "staying proceedings for its collection or enforcement. "This is a right which he has acquired, and of which he "cannot be deprived without due process of law." *Sage* v. *R. R. Co.*, 93 U. S., 417.

"It is not within the power of a justice or judge of the "Appellate court to grant a stay of process on the judg- "ment or decree, if this has not been done." *Kitchen* v. *Randolph*, 93 U. S., 92.

That we are, in making the present motion, pursuing the proper remedy in this case, is shown expressly by the case of *Saltmarsh* v. *Tuthill*, 12 How., 387. In that case, plaintiff in error had not taken out the writ within the ten days, and the Circuit court granted a supersedeas, or rather a stay of execution. There, as here, the plaintiff moved for a writ of execution, which motion the court denied. A mandamus proceeding was then instituted in this court, to compel the court to issue an execution, and TANEY, C. J., said:

"Nor is there any equitable power in the Circuit court to stay the execution, upon the ground that a mistake as to the manner or time of removing the case was committed. And it is immaterial, in this respect, whether it was the mistake of the party *or the court.* For this court has never deemed the tribunals of the United States authorized to dispense with the express provisions of the acts of Congress, regulating appeals and writs of error, upon *any equitable ground.* No such power is given to them by law. It was so decided in this court, in *United States* v. *Curry and others*, 6 How., 113; and *Hogan and others* v. *Ross*, 11 Ib., 297. The Circuit court, therefore, *erred* in setting aside the execution which the plaintiff had issued on the judgment.

"But we do not think it necessary at this time to determine whether this court has the power to issue the *mandamus*, requiring the Circuit court to issue the execution. Because we are satisfied, from the facts before us, that the Circuit court, without any coercive process, will conform to the opinion of this court, and issue execution when informed of this decision."

In accordance with the intimation given in the last quotation, the circuit judge has said in his opinion, delivered in the case at bar, that any intimation given by this court, in regard to the issuance of this writ of restitution asked for, will be followed by him without any order being entered on him in regard thereto. We therefore respectfully ask the court to rule whether or not defendant in error is entitled to a writ of restitution, even if it is of the opinion that technically this question ought to be raised on a petition for mandamus, or that the motion in the court below for the writ, the order overruling such motion, and the opinion of the court thereon, ought to be made a part of the record in this cause by a writ of *certiorari*.

Respectfully submitted.

WILLIAM BURRY,

Attorney for Defendant in Error.

EXHIBIT A.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

John M. Tiernan
v.
Edward R. Booth. } *Ejectment.*

STATE OF ILLINOIS,
COUNTY OF COOK. } ss.

Charles Scates, being duly sworn, says that he is a stenographer, and reported and took down in shorthand the testimony given in the above entitled cause, on a trial had on the 21st, 22d and 23d days of November, A. D. 1878; that on said trial the said defendant was introduced as a witness on his own behalf, and testified as follows:

" Q. What did you pay for the rest of the section per " acre?

" A. In the neighborhood of twenty dollars.

" Q. Was'nt it twenty-five dollars?

" A. No, sir, not quite."

This affiant also says, that said defendant also, at said time and place, testified as follows:

" Q. How much an acre did you pay for this land?

" A. I could tell by figuring a little while: I think it " was about $20 an acre I paid for the land, and then I " had to pay for the improvements that Mr. Campbell " had put on. I forget just how it did figure out.

" Q. Isn't it just $5 and a fraction an acre?

" A. You mean the northeast quarter?

" Q. Yes, I mean the northeast quarter?

" A. Well, you can figure it out. It comes to $880.

" Q. $5.50?

" A. Yes, sir; there is a great deal of difference be-
" tween the northeast quarter of section 29 and the bal-
" ance of the section.

" Q. The other is worth three times as much as
" this?

" A. Yes, sir, very nearly. The other is good strong
" muck land, and the northeast quarter is mostly sand
" knolls and big sloughs. There is a great difference.
" The balance of the section is all good farming land."

This affiant also says, that said defendant also, at said time and place, testified as follows:

" Q. Your attention has been called to the difference
" in value between the northeast quarter and the balance
" of the section. Won't you please state to the jury the
" comparative condition of the soil?

" A. The southeast quarter and the southwest quar-
" ter and the northwest quarter is most of it what we
" call black muck soil, and it is a very rich soil on all
" those pieces of land, and lays well for farming pur-
" poses or pasture there. The most of my land that I
" own there is in blue grass pasture, and of the very best
" quality, I consider. The northeast quarter once was
" timber mostly, and was, in certain ridges, covered with
" timber, and between the ridges were large wet sloughs,
" and none of it worth anything for farming purposes,
" but it makes a very good pasture; and there was a
" great deal of difference between the northeast quarter
" and the balance of the section as regards value."

This affiant also says, that said defendant also, at said time and place, testified as follows:

"Q. How much do you consider that northeast quar-
"ter worth? How much did you consider it worth at
"the time you bought it?

"A. About what I paid for it.

"Q. $5.50 per acre? How much do you think it
"worth now?

"A. Well, in connection with the balance of my farm,
"I consider it worth $20 an acre. I don't consider it
"worth that much to make a farm of it by itself, because
"there is no farming land there to speak of."

This affiant further says, that on said trial, at said time and place, one S. G. Stevens was introduced by said defendant as a witness on his behalf, and testified as follows:

"Q. Mr. Stevens, will you state to the jury the con-
"dition of this northeast quarter—the condition of the
"land in 1868—the quality of the land in 1868?

"A. It was what I should consider a poor piece of
"land—

"Q. Describe it, please?

"A. It would be for me. It was a sandy barren,
"a good deal of sand knolls, and a big slough run
"through it. Well, when I first went on there to build
"fence, there was a good deal of it in the northeast cor-
"ner like, there, that was no grass on it, or anything
"else. There was just sand blowing there. There
"didn't seem to be no soil there, but just dry sand. When
"you come back a little further it was a little better—
"sodded over with blue grass and so on. It is not a
"quarter of land that a man could make a living on to

" go to farming with it, plowing with it, or anything that " way. I do not consider it fit for anything only for pas- " ture land, and for a man like Mr. Booth, that has got a " farm adjoining it there, it makes pasture land.

" Q. What were you doing in 1868, farming?

" A. Farming.

" Q. Were you acquainted with the value of lands " there—what they were selling for?

" A. Yes, sir.

" Q. Did you know at that time?

" A. Somewhat.

" Q. What in your opinion was that northeast quar- " ter worth in 1868?"

(Objected to.)

MR. BURRY:

" Q. It was in 1868 that you came there?

" A. No, sir.

" Q. When was it you came there?

" A. It will be twelve years the sixteenth day of next " March since I came here.

" Q. That would be 1866—in March?

" A. Yes, sir.

" Q. You say you are somewhat acquainted with the " prices of lands?

" A. Well, what a man generally would get in that " way who was not dealing in land.

" Q. Were you the owner of a farm there then?

" A. Yes, sir.

"Q. Were you working for Booth?

"A. I had a farm rented from Mr. Booth. I lived on "his farm there, right where I first spoke of, for seven "years.

"Q. Had you ever bought any land in that locality?

"A. No, sir.

"Q. Had there been much land sold in that locality?

"A. Not at present.

"Q. Had there been?

"A. There was considerable land changing around.

MR. NEEDHAM: "I think he may answer the question as "to what in his opinion was the value of the property at "that time.

"A. The value of that property for me— "

THE COURT: "No, no."

MR. NEEDHAM:

"Q. State what it was worth per acre in the market?

"A. It was not worth over five or six dollars per "acre."

This affiant further says, that on said trial, at said time and place, one Matthew Bogert was introduced by said defendant as a witness on his behalf, and testified as follows:

"Q. Will you describe the condition of that section?

"A. Of the whole section?

"Q. No, of that quarter section in controversy?

"A. Well, the land down on those ridges the year "before had been timbered, but it was all cut off except

"scrubby brush and such stuff, and they were sandy bar-
"rens like. Between those ridges were big sloughs,
"where large slough grass grew. On those ridges there
"was not much of anything, except barren brush."

This affiant further says, that on said trial, at said time and place, one James N. Redding was introduced by said defendant as a witness on his behalf, and testified as follows:

"Q. Were you acquainted with the value of lands in
"that locality?

"A. Well, I have had some knowledge of them by
"purchasing and selling some.

"Q. Were you upon this section in 1868, or prior
"thereto?

"A. Yes, sir; I had been upon that section consider-
"able prior to that time.

"Q. What in your opinion was the value of this
"northeast quarter in 1868—the cash value in the
"market?

"A. Well, I was concerned with the balance of the
"section; I had an interest in the balance—in the other
"three quarters of the section, which I think was sold
"for nine dollars; that is my recollection, nine dollars
"per acre. This quarter was I always considered worth
"a good deal less—perhaps not very much over half in
"real value to what the balance of the section was worth.
"My impression is that Mr. Veghte paid nine dollars an
"acre for it. I am not positive as to the price, but that
"is my present impression.

"Q. Per acre, what would you consider the north-
"east quarter worth at that time?

"A. At that time, my impression now is, that I "thought that five or six dollars an acre was about a fair "price for it."

CHARLES SCATES.

Subscribed and sworn to before me, this 23d day of February, A. D. 1882.

[NOTARIAL SEAL.]

ALICE C. NUTE,
Notary Public.

EXHIBIT B.

UNITED STATES CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS.

John M. Tiernan
v.
Edward R. Booth. } *Ejectment.*

TRANSCRIPT OF RECORD.

Messrs. NEEDHAM & MILLER,
Attorneys for Plaintiff in Error.

GEORGE BURRY, ESQ.,
Attorney for Defendant in Error.

U. S. CIRCUIT COURT, N. D. ILL.

October 13, 1880.

J. M. Tiernan v. E. R. Booth.

WRIT OF ERROR—WHEN A SUPERSEDEAS.

Where a party suing out a writ of error has complied with the statute in that regard, the writ of error becomes a supersedeas *per se*. It is not in such cases necessary that the judge make an order that the writ operate as a supersedeas.—Ed. Chicago Legal News.

Plaintiff's counsel on the motion for a writ of possession presented the following authorities: *Sage* v. *R. R. Co.*, 93 U. S., 417; *Kitchen* v. *Randolph*, 93 U. S., 86; *City of Washington* v. *Denison*, 6 Wallace, 496; *Stockton* v. *Bishop*, 2 Howard, 74; *Rubber Co.* v. *Goodyear*, 6 Wall., 156; *Silver* v. *Ladd*, 6 Wall., 440; *Palmer* v. *Downer*, 7 Wall., 541; *U. S.* v. *Hodge*, 3 Howard, 534; *Bacon* v. *Hart*, 1st Black, 38; *U. S.* v. *Curry*, 6 Howard, 113; *Hogan* v. *Ross*, 11 Howard, 297; *Feret* v. *Hill*, 15 Queen's Bench, 207; Conkling's Treatise, 671.

Defendant's counsel cited the following authorities: *Sage* v. *Railroad Company*, 96 U. S., 712; *Carroll* v. *Dorsey*, 20 Howard, 207; *U. S.* v. *Tates*, 6 Howard, 605; *Alveso* v. *U. S.*, 5th Wallace, 824; *U. S.* v. *Gerney*, 1st Wallace, 701; *Bangs* v. *Railroad Company*, 23 Howard, 1; *Davison* v. *Lanier*, 4th Wallace, 447; *Barton* v. *Forsyth*, 5 Wallace, 1; *Villaboes* v. *U. S.*, 6th Howard, 89 and 91.

DRUMMOND, J.: In this case a judgment was rendered by this court in favor of the plaintiff, in an action of ejectment, on the 13th day of December, 1879, and within the proper time a bond was filed by the defendant, with security approved by the court, in an amount sufficient to make it a supersedeas. A writ of error was seasonably sued out, and a copy was also left in the clerk's office for the opposite party, in conformity with the statute. In all respects, therefore, the necessary *steps* were taken by the defendant, to make the writ of error a *supersedeas* unless one is lacking, viz: because the citation was not signed by the judge until the 4th day of September, A. D. 1880.

The practice does not seem to be uniform in the various Circuit courts of the United States, as to the manner of making a writ of error a *supersedeas* by the action of the court.

It seems to be conceded that it is not necessary, provided everything has been done required by the statute, for a court or the judge to make an order that the writ of error is a *supersedeas*. It becomes so *per se* upon compliance with the statute. The practice in this circuit has usually been to treat a writ of error upon the execution and approval of a sufficient bond, and the issue of the citation, as a *supersedeas* without any express order of the court or judge.

It is generally understood between parties and by the court whether the bond that is offered, being sufficient in amount, and the security adequate, is intended and does operate as a *supersedeas*. If that is so understood by the counsel and the court, no application is made for an execution or a writ of possession, as the case may be; and therefore no order is generally entered in such cases. At the same time the practice has been occasionally for coun-

sel to ask that a special order shall be entered by the court or judge declaring the writ of error a *supersedeas*, and when so desired the order has been made. The language of the statute is (Section 1,000), "every justice or "judge signing a citation on any writ of error shall * "* * take good and sufficient security that the plaintiff "in error or the appellant shall prosecute his writ or ap- "peal to effect." Undoubtedly the general rule is that the signing the citation and taking the security are simultaneous acts. The statute seems to imply that they are, and to impose as a duty on the judge when he signs the citation, that he shall then take good and sufficient security. In practice the citation is usually prepared by the counsel and presented to the judge for his signature. In fact it may be stated, I think, that this is the universal practice. In consequence of this, and because no citation was presented to the judge for signature, none was signed in this case, and it was not until the 4th day of September, 1880, when it was ascertained that no citation had ever been actually signed or served, that the citation was presented to the judge for his signature, which was then affixed. The writ of error was returnable to the first day of the present October term, and the citation was issued and served on the plaintiff to appear on the first day of the October term of the Supreme court for this year, to answer the writ of error.

It will be seen from this statement that if the plaintiff is entitled to a writ of possession in this case, it will be in consequence of the technicality of a citation not having been prepared and presented to the judge and signed within sixty days after the judgment was entered. I do not feel inclined to sustain a technicality of this kind under the facts of this case.

Undoubtedly it is competent for the Supreme court to grant a *supersedeas*, even where none has been allowed by the Circuit court. But here all that was necessary to make the *supersedeas* effectual, was the citation and the signature of the judge within 60 days after the judgment was rendered. It seems to me for all practical purposes, the plaintiff having been served with a citation before the October term of the Supreme court, and notice thus being brought home to him of the writ of error and of the term to which it was returnable, and a bond having been executed, which was treated by the court as a *supersedeas* bond, it is sufficient to entitle the defendant to take the judgment of the Supreme court upon the merits of the case itself, before the plaintiff can call on this court for a writ of possession.

At any rate, if it be a matter of doubt, I prefer to take this view of the case, in order that the plaintiff may avail himself of any error, if any has been committed by this court, and take the opinion of the Supreme court upon the question.

If that court, upon proper application, shall be of opinion that under the facts in this case, the plaintiff is entitled to a writ of possession, this court will follow that ruling without any order being made, and upon being informed that the Supreme court has made such ruling.

MESSRS. GEORGE AND WILLIAM BURRY, *For Plaintiff.*

MESSRS. NEEDHAM & MILLER, *For Defendant.*

(Endorsed)

Filed October 13, A. D. 1880.

WM. H. BRADLEY, *Clerk.*

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.

John M. Tiernan
vs.
Edward R. Booth. } *Ejectment.*

And now comes said plaintiff, by his attorneys, and moves the court to order a writ of restitution to issue herein to put said plaintiff in possession of the premises in controversy in this case for the reason that no supersedeas was perfected in this cause.

GEORGE BURRY,
Attorney for Plaintiff.

(Endorsed.)

Filed October 13, 1880.

WM. H. BRADLEY,
Clerk.

UNITED STATES CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS.

WEDNESDAY, October 13, A. D. 1880.

Present, Hon. THOMAS DRUMMOND, *Judge.*

John M. Tiernan
vs.
Edward R. Booth. } *Ejectment.*

Now at this day comes the plaintiff, by his counsel, and moves the court for a writ of possession in this case, because there is no supersedeas operating upon the judgment which was entered in this cause on the thirteenth day of December, A. D. 1879, and the said motion having been argued by the counsel of the respective parties, the same is overruled by the court, to which ruling the plaintiff, by his counsel, excepts.

NORTHERN DISTRICT OF ILLINOIS, SCT.

I, William H. Bradley, clerk of the Circuit court of the United States, for the Northern District of Illinois, do hereby certify that the above and foregoing are true, correct and complete copies of the opinion of the court filed October 13, A. D. 1880, and as published in The Chicago Legal News of date December 4, 1880; of the motion for a writ of restitution, filed October 13, A. D. 1880, and of the order of court entered of record on the same day—the same constituting a complete transcript of the record of all the proceedings had in said court in the cause wherein John M. Tiernan was the plaintiff, and Edward A. Booth was the defendant, subsequent to the twenty-third day of December, A. D. 1879, said last mentioned day being the date of the filing of the bond in said entitled cause, as appears from the files and records of said county now remaining in my custody and control.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at my [SEAL.] office in Chicago, in said district, this 9th day of December, A. D. 1880, and of our independence the 105th.

WM. H. BRADLEY,
Clerk.

(Endorsed.) Supreme court U. S., 1880, Oct. term, No. 640, Edwin R. Booth, plaintiff in error, *vs.* John M. Tiernan. Opinion of Circuit court, and motion for restitution and order.

Filed 13th Dec'r, 1880.

109-205

OFFICE SUPREME COURT U.S.
FILED
APR 3 1882
JAMES H. MCKENNEY

Supreme Court of the United States.

EDWARD R. BOOTH, PLAINTIFF IN ERROR,
vs.
JOHN M. TIERNAN, DEFENDANT IN ERROR.
No. 640.

SUGGESTIONS IN OPPOSITION TO MOTION.

Upon the first point made in support of the motion, I submit to the court the affidavits filed this morning showing the value of the property in controversy. This is a suit in ejectment, and the matter in controversy is the title to the land. I was not myself present when this was decided or when the writ of error was sued out, but I understand that the value of the land was shown to the court at the time the writ of error was sued out.

It is well settled, I think, that the value of the land in controversy in a suit of this sort may be shown by affidavit.

Rush *v.* Parker, 5 Cranch, 287.
May *v.* Sloan, 11 Otto, 231.

And also that this court will give time to procure affidavits as to the value of the matter in dispute.

Rush *v.* Parker, 5 Cranch, 287.

If, therefore, the affidavits filed should seem to the court to have been taken on insufficient notice, or to be in any otherwise informal, I respectfully ask that time be allowed to procure affidavits showing the value of the

land in controversy, or to certify to the court the affidavits used in the court below at the time that the writ of error was allowed.

This cause will not be reached upon the call at this term, and the defendant in error cannot be prejudiced by granting the time for that purpose. The affidavits filed show that the value of the land can be proven to exceed $5,000.

The affidavits filed are as follows:

In the Supreme Court of the United States, October Term, A. D. 1881.

Edward R. Booth, plaintiff in error,
vs.
John M. Tiernan, defendant in error.

Error to the Circuit Court of the United States for the northern district of Illinois.

To WILLIAM BURRY, Esq., att'y for defendant in error:

Take notice, that upon the hearing of the motions of defendant in error to dismiss, &c., I shall submit to said court the affidavits of Briggs Fuller, Chester K. Snyder, Amos Clover, G. W. Melbourn, Jacob C. Lutz, John Allison, Edward R. Booth and Charles W. Needham, hereto attached, and copies of which are herewith handed you.

B. C. COOK,
Att'y for Pl'ff in Error.

I hereby acknowledge service of above notice and copies of affidavits attached, this 28th day of March, A. D. 1882.

WM. BURRY,
Att'y for Def't in Error.

In the Supreme Court of the United States, October Term, A. D. 1881.

Edward R. Booth, plaintiff in error,
vs.
John M. Tiernan, defendant in error.

Error to the Circuit Court of the United States for the northern district of Illinois.

STATE OF ILLINOIS, }
Grundy County, } *ss.*

Briggs Fuller being duly sworn, on oath says that he is a farmer and is fifty-eight years of age; that he has resided for twenty years last past, and now resides, in Grundy county, in the State of Illinois; that for ten years last past he has been acquainted with the northeast quarter of section twenty-nine, town thirty-two north, range eight east of the third principal meridian in said Grundy county and State of Illinois, being the property in controversy in the above entitled cause. Affiant further says that he owns one hundred acres of land in said Grundy county; that he was acquainted with the value of above described quarter section in November and December, 1879; that the cash value thereof at said last mentioned time exceeded five thousand dollars, and is of greater amount at this time. Affiant further says that he has no interest whatever in the land or matter in controversy in this suit.

BRIGGS FULLER.

Subscribed and sworn to before me this 27th day March, A. D. 1882.

[SEAL.] LOUIS MUNSON,
Notary Public in and for and residing in Cook county, in said State.

In the Supreme Court of the United States, October Term, A. D. 1881.

Edward R. Booth, plaintiff in error, }
vs.
John M. Tiernan, defendant in error. }

Error to the Circuit Court of the United States for the northern district of Illinois.

STATE OF ILLINOIS, }
Grundy County, } *ss.*

Chester K. Snyder being duly sworn, on oath says that he is fifty years of age and is a dealer in grain in Grundy county, in the State of Illinois; that he has lived in said county for twenty years; that for fifteen years last past he has been acquainted with the northeast quarter of section twenty-nine, town thirty-two north, range eight east of the

third principal meridian in Grundy county, in the State of Illinois, being the property in controversy in the above entitled cause. Affiant further says that he owns three hundred and eighty acres of land in said county, and that he was acquainted with the value of above described quarter section in November and December, 1879; that the cash value thereof at the time last mentioned exceeded five thousand dollars, and exceeds that sum at this time. Affiant further says that he has no interest whatever in aforesaid quarter section or in the matter in controversy in this suit. CHESTER K. SNYDER.

Subscribed and sworn to before me this 27th day of March, A. D. 1882.

[SEAL.] LOUIS MUNSON,

Notary Public in and for and residing in Cook county, in said State.

In the Supreme Court of the United States, October Term, A. D. 1881.

Edward R. Booth, plaintiff in error,
vs.
John M. Tiernan, defendant in error.

Error to the Circuit Court of the United States for the northern district of Illinois.

STATE OF ILLINOIS,
County of Grundy, } *ss.*

Amos Clover being duly sworn, on oath says that he is a farmer; that he is fifty-nine years of age; that he has resided for thirty-eight years last past and now resides in Grundy county, in the State of Illinois; that he has been acquainted for the last fifteen years with the following described piece of land, to wit, the northeast quarter of section twenty-nine, in town thirty-two north, range eight east of the third principal meridian in said county of Gundy and State of Illinois, being the property in controversy in the above entitled cause; that he owns five hundred acres of land in said county; that he owns one hundred and seventy-five acres of land within ten miles of the land above described; that he was acquainted with the value of said land above described in November and De-

cember, 1879; that said value at the last mentioned time was more than five thousand dollars ($5,000); that the value of said land in controversy was forty dollars per acre at the time last mentioned; that he has no interest whatever in the above described land or the matter in controversy in said suit. AMOS CLOVER.

Subscribed and sworn to before me this 27th day of March, A. D. 1882.

[SEAL.] LOUIS MUNSON,
Notary Public in and for and residing in Cook county, in said State.

In the Supreme Court of the United States, October Term, A. D. 1881.

Edward R. Booth, plaintiff in error,
vs.
John M. Tiernan, defendant in error.

Error to the Circuit Court of the United States for the northern district of Illinois.

STATE OF ILLINOIS,
Grundy County, } *ss.*

G. W. Melbourn being duly sworn, on oath says that he is forty-six years of age and has resided for twenty-one years last past in Grundy county, in the State of Illinois; that he owns eighty acres of land in said county; that for fifteen years last past he has been acquainted with the north-east quarter of section twenty-nine, town thirty-two north, range eight east of the third principal meridian, being the land in controversy in the above entitled cause. Affiant further says that he was acquainted with the value of said described land in November and December, 1879; the cash value thereof at that time exceeded five thousand dollars; that at said last mentioned time said land in controversy was worth from thirty-five dollars to forty dollars per acre. Affiant further says that he has no interest whatever in said described land, or in the matter in controversy in this suit. Affiant further says that said above described quarter section is in said Grundy county, in the State of Illinois.

G. W. MELBOURN.

Subscribed and sworn to before me this 27th day of March, A. D. 1882.

[SEAL.] LOUIS MUNSON,

Notary Public in and for and residing in Cook county, in said State.

In the Supreme Court of the United States, October Term, A. D. 1881.

Edward R. Booth, plaintiff in error,
vs.
John M. Tiernan, defendant in error.

Error to the Circuit Court of the United States for the northern district of Illinois.

STATE OF ILLINOIS,
County of Grundy, } *ss.*

Jacob C. Lutz being duly sworn, on oath says that he is thirty-eight years of age and has resided for twenty-five years last past in Grundy county and State of Illinois; that he is a merchant and banker doing business in said county; that he is acquainted with the northeast quarter of section twenty-nine, town thirty-two north, range eight east of the third principal meridian, and has been acquainted with said land for six years last past; that above described land is the property in controversy in the above entitled cause. Affiant further says that he is the owner of twenty-one hundred acres of land within from two to four miles from above described quarter section; that he was acquainted with the value of aforesaid land in controversy in November and December, 1879, and that the cash value thereof at said last mentioned time exceeded five thousand dollars ($5,000); that this affiant has no interest whatever in the land in controversy, or in the matter contested in this suit.

JACOB C. LUTZ.

Subscribed and sworn to before me this 27th day of March, A. D. 1882.

[SEAL.] LOUIS MUNSON,

Notary Public in and for and residing in the county of Cook, in said State.

In the Supreme Court of the United States, October Term, A. D. 1881.

Edward R. Booth, plaintiff in error,
vs.
John M. Tiernan, defendant in error.

Error to the Circuit Court of the United States for the northern district of Illinois.

STATE OF ILLINOIS,
Grundy County, } *ss.*

John Allison being duly sworn, on oath says that he is fifty-eight years of age and has resided in the county of Grundy and State of Illinois for thirty years last past, and resides in said county now; that he is a banker doing business in said county; that he owns land in the immediate vicinity of the land hereinafter described in aforesaid county; that he owns in fee-simple eighty acres of land in the section adjoining the land hereinafter described, and has within the three months last past contracted to purchase a half section of land immediately north of the land hereinafter described; that he has been acquainted for fifteen years last past with the northeast quarter of section twenty-nine, town thirty-two north, range eight east of the third principal meridian, being the property in controversy in the above entitled cause, said quarter-section being in said Grundy county and State of Illinois. Affiant further says that he was acquainted with the value of above described quarter-section in November and December, 1879; that the cash value thereof at the time last mentioned exceeded five thousand dollars, and that at the present time the cash value thereof is eight thousand dollars. Affiant further says that he has no interest whatever in above described land, or in the matter in controversy in this suit,

JOHN ALLISON.

Subscribed and sworn to before me this 27th day of March, A. D. 1882.

[SEAL.] LOUIS MUNSON,
Notary Public in and for and residing in Cook county, in said State.

In the Supreme Court of the United States, October Term, A. D. 1881.

Edward R. Booth, plaintiff in error,
vs.
John M. Tiernan, defendant in error.

Error to the Circuit Court of the United States for the northern district of Illinois.

STATE OF ILLINOIS, Cook County, } *ss.*

Edward R. Booth being duly sworn, on oath says that he is the plaintiff in error in the above entitled cause; that in the year 1878, when he gave the testimony referred to and set forth as "Exhibit A" in the printed "argument on motions to dismiss," &c., of the attorney for defendant in error herein, farming lands in the vicinity of the lands in controversy were greatly depressed in value on account of the financial depression theretofore and at the same time existing in business interests throughout the country; that thereafter, commencing with the year 1879, there has been a steady and marked increase in the market value of said land owing to the increased value of farm products and other causes; that by actual tests made upon the property owned by this affiant, of which the quarter-section in controversy forms a part, it has since been demonstrated that a valuable vein of coal underlies the land in controversy, which is believed to be from three to four feet in thickness. Affiant further says that from actual sales and the prices offered for land in the vicinity of the land in controversy, he knows and states the fact to be that the value of said quarter-section in controversy at the time the writ of error was sued out herein and at the time the judgment was rendered in the Circuit Court of the United States for the northern district of Illinois, exceeded in a considerable amount the sum of five thousand dollars, and that the value thereof at the present time exceeds the sum of seven thousand dollars. Affiant further says that on the 23d day of December, A. D. 1879, he was present in the Circuit Court of the United States for the northern district of Illinois before the Hon. Thomas Drummond, the judge thereof, at the time when the said judge approved the supersedeas bond herein; that the attorney for the said John M. Tier-

nan, who tried the said cause in the said Circuit Court was, present and then and there submitted and read affidavits before the said judge upon the question of the value of said land, and was heard upon the motion on behalf of this affiant to make said bond a supersedeas bond; that said attorney of said defendant in error was present when said judge approved said bond herein, and said attorney had actual notice of the issuance of the writ of error herein, and the said action of said judge in granting a supersedeas herein, on the 23d day of December, 1879; and further affiant saith not.

E. R. BOOTH.

Subscribed and sworn to before me this 28th day of March, A. D. 1882.

LOUIS MUNSON,
Notary Public.

[SEAL.]

In the Supreme Court of the United States, October Term, A. D. 1881.

Edward R. Booth, plaintiff in error,
vs.
John M. Tiernan, defendant in error.

Error to the Circuit Court of the United States for the northern district of Illinois.

STATE OF ILLINOIS,
Cook County, } *ss.*

Charles W. Needham being duly sworn, on oath says that he is one of the attorneys for the said plaintiff in error, and was acting for said plaintiff in error at the time the writ of error was issued herein; that on the 23d day of December, 1879, the said defendant in error appeared by his attorney before the Hon. Thomas Drummond in said Circuit Court, pursuant to a notice before that time served upon him by this affiant, and was heard upon the motion of this affiant for a supersedeas in said cause; that said attorney at said time submitted and read to the said judge affidavits as to the value of said laid land in controversy, and then and there had actual notice of the issuance of the writ of error herein, and the approval of said supersedeas bond by said judge, and further affiant saith not.

C. W. NEEDHAM.

Subscribed and sworn to before me this 28th day of March, A. D. 1882.

LOUIS MUNSON,
Notary Public.

[SEAL.]

II. Counsel for the plaintiff moves that the judgment be affirmed because it is manifest from the record that the writ of error is taken merely for delay. It seems to me certain that want of jurisdiction and irregularity of the writ or want of a proper notice to the adverse party are the only grounds of dismissal. I cite as sustaining this view the case of Hecker *vs.* Fowler, 1st Black, 95, in which it seems to me the rule is distinctly affirmed, where it shall appear on final hearing that an appeal has been taken for delay merely, rule 23 of this court provides the proper penalty.

I quote from the decision cited: "Where a judgment appears to have been rendered which the party is entitled to have revised in this court, and it is also seen that it comes here for such revision upon proper process duly issued, all other questions must await the final hearing."

I submit that there are very important questions in this case, one of which is whether the certified copy of the deed from the records of La Salle county was properly admitted in evidence. This record was not made by the recorder, the only person at that time authorized by the law to make such record; it is shown not to have been made in his handwriting. The record purports to have been made in 1840. No person at that time was authorized by the law to make the record but the recorder. On the 24th day of January, 1842, the Legislature modified the rule by allowing the recorder to appoint a deputy to make the record only when the recorder was disabled by sickness or bodily infirmity. (Laws of 1842, page 204.)

The law authorizing the appointment of deputies to make such records, was not passed until February 26th, 1845. (See Laws of 1845, page 587.)

We wish to be heard upon the question whether this land can be taken away from the plaintiff in error upon a copy of a record made by a person not authorized to make it, and not sworn to make it truly. The claim of the de-

fendant in error being not that this was a true record of anything, but that it showed that a deed differing from the record had been filed for record.

We wish to be heard also upon the question whether the memorandum which was admitted in evidence was competent evidence. The law now requires such a memorandum to be kept, but when this record purports to have been made the law of July 1, 1829, was in force, which was wholly different and did not require the entry to describe the land by metes and bounds or government surveys.

See Laws of Revised Stat. 1833, p. 511.

We wish to be heard upon the question whether the residence of a tenant of the plaintiff in error upon the land in question was not the residence of the plaintiff himself under the Illinois statute in such manner that such residence, continued and supplemented by that of the plaintiff in error himself, brought the case within the limitation of that statute. I do not discuss these questions here because I think the plaintiff has a right to have them discussed fully upon a hearing of the case. I refer to them only to show that there are grave and important questions in the case which ought not to be determined upon this motion without a hearing.

The defendant in error will not be prejudiced by having this cause heard in the usual manner; he has a good bond which will indemnify him against any possible loss.

III. Upon the motion to set aside the supersedeas, I submit the following suggestions:

The point made by counsel for defendant in error is that the writ of error does not become a supersedeas because the citation was not issued on the very day when the writ of error was sued out, although it is not denied that the citation was signed by the judge and duly served in ample time to have removed the cause to this court. The object of giving the bond is to give the

security required under the eleventh section of the act of June 1st, 1872, and if the bond is executed in proper time it seems to be a compliance with that statute, provided the citation is issued and served in proper time to give the notice required of the removal of the cause to this court.

A citation does accompany the writ of error in this case, and is shown to have been served more than thirty days before the first day of the present term of this court. I am unable to perceive any reason why such service is not sufficient.

The cases cited in the brief of counsel for defendant in error were cases in which no citation was issued or no service was had within the time required by law. Appended to the brief of counsel for defendant in error the decision of Judge Drummond appears overruling the motion for writ of possession. It seems to me that the reasons assigned by him are satisfactory.

The proper security was given to make the writ of error supersedeas; a citation is necessary only as a means of giving the adverse party notice within the statutory time of the issuance of the writ. The writ borrows no validity from the citation, (Carroll *v.* Dresus, 20 Howard, 207,) otherwise than as notice to the adverse party. (Cohens *v.* Virginia, 6 Wheaton, 418.)

Counsel insist that the signing of the citation qualifies the judge to approve the bond. That this is not so is manifest from the rule that if the writ of error is sued out at the same term at which the judgment is rendered, no citation is necessary, simply because the presumption of notice is sufficient.

Sage *v.* R. R. Co., 96 U. S., 714.
Reily *v.* Lamar, 2 Cranch, 349.
Brocket *v.* Brocket, 2 Howard, 238.

The object of a citation is only to give the statutory notice to the adverse party.

United States *v.* Gomez, 1 Wall., 690.

I respectfully submit that any citation which will sustain a writ of error will sustain a supersedeas. Section 1007, Rev. Stat., which defines the manner in which a writ becomes a supersedeas, makes two requirements:

The filing of the writ in the clerk's office within sixty days, and giving the security. The form of the citation is not changed, nor its time of service limited. It is still but a notice to the adverse party that a writ of error has been issued.

I think it sufficiently appears from this record that this writ of error was allowed and issued at the same term when the judgment was rendered. The judgment was rendered December 13th, 1879, in the adjourned October term of the court, A. D. 1879. The writ of error was issued on the 23d day of the same month. I think this court will take judicial notice that no new term of the Circuit Court could commence between those dates, and as no adjournment of the court appears, I think the presumption is that the term still continued. If the court should not agree with me in this conclusion, and it should become important to the decision of this motion, then I respectfully ask that time be given me to show by an amended record that the writ of error was actually issued at the same time that the judgment was rendered.

I ask attention to the affidavit of Mr. Needham, the attorney who tried this case in the Circuit Court, showing that counsel for the plaintiff had notice of the issuing of the writ of error, was present at the time, and submitted affidavits as to the value of the property in controversy.

B. C. COOK,
Att'y for Pl't'ff in Error.

1 The motion to dismiss should be overruled - Land worth over $5,000 Cent - Since discovered. The question of value was passed upon by Court below when suspension applied for. Affidavits should be filed -

2 Overrule motion to affirm & refer to merits

3 Overrule motion to vacate suspension